CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 84.

GUSTAVE A. JAHN ET AL.

vs.

STEAMSHIP "FOLMINA," WILLIAM VAN EYKEN, CLAIMANT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 14, 1907.

(20,715.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 10. 1908

1 United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Townsend, and Coxe, Circuit Judges.

GUSTAVE A. JAHN and Another, Libellants-Appellants,
vs.
S. S. "FOLMINA;" WILLIAM VAN EYKEN, Claimant-Appellee.

This cause came here upon appeal from a decree of the district court, Eastern District of New York, dismissing a libel. Upon the hearing of the appeal questions or propositions of law arose, concerning which this court desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

The facts upon which the questions arise are as follows.

The S. S. "Folmina" sailed from Kobe, Japan for New York with a large shipment of rice on board, in No. 3 hold under a bill of lading which exempted the carrier from "The act of God * * * loss or damage from * * * explosion, heat, or fire on board * * * risk of craft or hulk or trans-shipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind." It further provided that the ship "is not liable for * * * sweat, rust, decay, vermin, rain spray."

The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was
2 downward from the first six tiers of bags to the bottom of the hold which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

A majority of the court are satisfied that the damage was caused by sea-water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

The Folmina was a steel steamship of the highest class in Lloyds' Register. Before starting for Japan she was in drydock at New York and was there surveyed by Lloyds' surveyor. Some time before she had been in drydock at Cardiff, where some repairs were made to the rudder, rudder-quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

During and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with No. 3 hold and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants

and their underwriters and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side-plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence (other than the mere circumstance that the damage was by sea-water,—if that be considered evidence) was found that there had been leaks in any part of the frame, structure, side plating, riveting, pipes or appurtenances of the ship, through which water might have reached that part
3 of No. 3 hold where the damage was done. No adequate means of access of sea water were found, nor any defect in the steamer which then appeared to be seaworthy.

Question Certified.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court are:

1. "Whether damage to the cargo of an apparently seaworthy ship through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of the bill of lading exception above quoted?

2. Whether the ship is relieved from liability in consequence of said exception?"

In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, establishing Courts of Appeal-, the foregoing question of law is by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court.

New York, May 7th 1907.

E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

4 United States Circuit Court of Appeals, Second Circuit.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate was filed and entered of record in my office on the 7th day of May 1907, and by direction of the Judges of said Court, the certificate is by me forwarded to the Supreme Court of the United States.

Dated May 7, 1907.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

5 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Gustave A. Jahn and ano., Lib'l'ts-Appellants, *vs.* S. S. "Folmina", William Van Eyken, Claimant-Appellee. Certificate. United States Circuit Court of Appeals, Second Circuit. Filed May 7, 1907. William Parkin, Clerk.

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7

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JAN 19 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 84.

GUSTAVE A. JAHN ET AL.,
Libellants.

vs.

STEAMSHIP "FOLMINA," WILLIAM VAN EYKEN,
Claimant.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF GUSTAVE A. JAHN & CO. CARGO OWNERS.

WALLACE, BUTLER & BROWN,
Proctors for Libellants.

FREDERICK M. BROWN,
Advocate.

[illegible] PRESS AND BINDERY COMPANY, 100 WILLIAM ST., N. Y.

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Supreme Court of the United States.

GUSTAVE A. JAHN *et al.*, *Libellants,* AGAINST The STEAMSHIP FOLMINA, William Van Eyken, *Claimant.*	October Term, 1908. No. 84.

BRIEF ON BEHALF OF GUSTAVE A. JAHN & CO., CARGO OWNERS.

Gustave A. Jahn & Co., as owners of a shipment of rice which was carried in No. 3 hold of the steamer *Folmina* from Japan to New York, libelled the steamer in the District Court of the United States for the Eastern District of New York, to recover damages in respect of the serious injury to their rice by wetting, which was disclosed upon the discharge of the steamer.

Although the cause of the damage was wholly unexplained by the carrier, and although no severe weather or other casualty was shown by the proofs, Judge Thomas ordered a dismissal of the libel apparently on the ground that the evidence of the general good condition of the *Folmina* was sufficient to warrant the inference that the loss was due to a sea peril. 143 Fed. Rep. 636.

Upon an appeal by the cargo owners to the Circuit Court of Appeals for the Second Circuit, the Judges of that Court did not agree concerning the cause of the damage or concerning the legal effect of unexplained sea water damage, of which character a majority of the Judges of that Court believed the damage to be: 153 Federal Reporter 364.

The Circuit Court of Appeals for the Second Circuit thereupon certified to this Court the following statement of facts and questions of law:

> "The S. S. "Folmina" sailed from Kobe, " Japan, for New York with a large shipment " of rice on board, in No. 3 hold under a bill of " lading which exempted the carrier from " 'The act of God * * * loss or damage " from * * * explosion, heat, or fire on " board * * * risk of craft or hulk or " trans-shipment and all and every the dan- " gers and accidents of the seas, rivers and " canals and of navigation of whatever nature " or kind.' It further provided that the ship " 'is not liable for * * * sweat, rust, de- " cay, vermin, rain, spray.'
>
> "The rice was in good order when put on " board, but when discharged in New York a " large part of it stowed on the starboard side " of the hold was found damaged. The area " of injury was downward from the first six " tiers of bags to the bottom of the hold " which was dry, forward from about the " after end of the hatchway nearly to the " bulkhead, and inboard about three or four " bags. The damage was caused by water " and consequent heat.
>
> " A majority of the court are satisfied that " the damage was caused by sea water and " that it was not shown that the vessel en- " countered sufficient stress of weather to " warrant the inference that it came in be- " cause of the action of external causes. " There was no evidence tending to show any " negligence, fault or error on the part of the " ship's officers or crew; the cargo was well " stowed and ventilated.
>
> " The Folmina was a steel steamship of " the highest class in Lloyds' Register. Be-

" fore starting for Japan she was in dry dock " at New York and was there surveyed by " Lloyds' surveyor. Some time before she " had been in dry dock at Cardiff, where " some repairs were made to the rudder, " rudder-quadrant and a ventilator. The " master testified to the general good condi- " tion of the steamer at the time she sailed " from Kobe.

" During and after the delivery of the " cargo, the main deck, the between-deck, the " pipes leading to or connected with No. 3 " hold and the shell plating in the wing of " No. 3 hold were carefully examined by " the officers of the ship, by surveyors rep- " resenting libellants and their underwriters " and it was afterwards examined by com- " petent and experienced surveyors represent- " ing both parties. The decks, hull, side- " plating and rivets of the ship were found to " be sound, intact and free from leaks. No " evidence (other than the mere circumstance " that the damage was by sea-water—if that " be considered evidence) was found that " there had been leaks in any part of the " frame, structure, side plating, riveting, " pipes or appurtenances of the ship, through " which water might have reached that part " of No. 3 hold where the damage was done. " No adequate means of access of sea-water " were found, nor any defect in the steamer " which then appeared to be seaworthy.

Questions Certified.

" Upon the facts above set forth, the ques- " tions of law concerning which this Court " desires the instruction of the Supreme " Court are:

1. " Whether damage to the cargo of an " apparently seaworthy ship through the un- " explained admission of sea water, in the " absence of any proof of fault on the part of " the officers or crew of the ship, is of itself a " sea peril within the meaning of the bill of " lading exception above quoted?

2. " Whether the ship is relieved from lia- " bility in consequence of said exception?"

It should be noted that there are only three *facts actually found* by the Circuit Court of Appeals, namely:

(1) That libellants' rice suffered injury while in the carrier's custody;
(2) That the injury consisted of sea water damage; and
(3) That the stowage and ventilation of the rice on board the steamer were good.

The Court also certified that there was *absence of proof* in the following respects:

(1) That there was no sufficient proof of stress of weather to warrant the inference that sea water entered owing to causes external to the ship;
(2) That there was no proof of any faults or negligence on the part of the crew of the steamer.

The Court has not found either seaworthiness or unseaworthiness on the part of the *Folmina*. What it has found is that there was an *appearance* of seaworthiness. It has found:

(1) That *the master testified* to the good general condition of the ship upon leaving Kobe, Japan;
(2) That in the port of arrival during and after the discharge of cargo, there was a careful examination of the ship resulting in a failure to discover any defect;
(3) That at the time of this examination in the port of discharge, there were no signs indicating the previous existence of leaks.

The *Folmina*, in view of the bill of lading which had been issued, bore toward her cargo the obligations of a common carrier.

The Commander-in-Chief, 1 Wall. 43, 51.
Pope v. *Nickerson*, 3 Story, 465, 473.
The Minnie Hammond, 9 Wall. 435, 459.
The Delaware, 14 Wall. 579, 596.

Judging from its original opinion (*The Folmina*, 153 Fed. 364), the purpose of the Circuit Court of Appeals in submitting the foregoing questions to this Court is to obtain an adjudication as to

(1) Whether the carrier of goods shipped under a bill of lading containing the usual sea peril exception is obligated, when he discharges goods damaged by sea water while within his custody, to make some affirmative showing or explanation from which it is apparent or inferable how sea water reached the goods, and that this happened owing to heavy weather or to some marine casualty, or to some other specific cause that is amongst those recognized as perils of the sea, or

(2) Whether, on the other hand, the mere fact that the goods were damaged by sea water while in the carrier's custody, raises a presumption that the goods were damaged by one of the causes just mentioned to the extent of imposing upon the shipper, if he is to recover, the burden of showing that the sea water reached the goods in question owing to some different cause.

The opposing views are well stated in the decision in the case of *The Patria*, 132 Fed., 972, and in the brief on behalf of the steamer *Folmina* which was filed in the Circuit Court of Appeals.

In *The Patria*, the Court said:

> " It is, no doubt, the rule, as appellant con-
> " tends, that, when the damage is manifestly
> " of the sort excepted, the ship is under no
> " obligation to show the promoting cause.
> " To illustrate: If the exception is ' damage
> " caused by peril of the sea,' and the cargo is
> " landed drenched with salt water, it will be
> " *for the ship to show that the salt water*
> " *found access to the cargo through a peril of*
> " *the sea;* but, if the exception is ' damage
> " by breakage,' and the article arrives broken,
> " the ship is not required to show how it got
> " broken, although the libellant may show
> " that negligence of those on the ship, or of

> " those who stowed her or discharged her,
> " caused the break, and, showing that, may
> " recover."

In the brief for the Folmina, on the other hand, it was said:

> " The exception " (of perils of the sea)
> " should relieve the ship unless the libellant
> " has shown by a preponderance of evidence
> " that the admission of sea water was due to
> " some negligence on the part of the claimant.
> " The affirmative of this proposition necessar-
> " ily rests on the libellant. The burden must
> " be supported by the production of proof.
> " It was, therefore, a part of the case of the
> " libellants to prove that the admission of sea
> " water was the result of some negligence
> " which should deprive the claimant of the
> " benefit of the exception " (pp. 83, 84).
>
> " Such a damage would be, *prima facie*, a
> " peril of the sea and would put upon the
> " owner of the goods the burden of proving
> " that it had been caused by negligence " (pp. 69, 70).

I.

The decision of this Court in the case of the G. R. Booth is controlling.

It should be stated at the outset that, in our view, the questions submitted to this Court for its decision have in their essential features already been decided by this Court in the case of *The G. R. Booth*, 171 U. S. 450.

The only differences between that case and the present case are, it is submitted, differences that make the owner of cargo on the *Folmina* more clearly entitled to redress than the owner of cargo on the *G. R. Booth*.

Both cases involve sea-water damage to cargo shipped under a bill of lading containing the usual

"sea peril" exception. In both cases, the record was bare of any proof of fault on the part of the carrier or his crew. In both cases, there was no affirmative indication of any antecedent defect or unseaworthiness on the part of the vessel. In both cases, the carrier's defense was that he was free from negligence, that he furnished a seaworthy vessel and that the entrance of sea water into such a vessel and without fault, amounts to a sea peril within the meaning of the bill of lading exception, and that under that exception, the carrier is entitled to exoneration.

The differences between the two cases are:

1. That in the case of the *G. R. Booth* the carrier *fully explained* the entrance of the sea water by showing that in a compartment adjacent to that in which libellants' sugar was stowed, a case of detonators exploded, making an aperture in the ship's side, through which sea water entered and damaged libellants' cargo. In the present case, on the other hand, the carrier either will not or cannot explain how sea water entered the *Folmina;* the record does not show whether he will not or cannot.

2. In the *G. R. Booth*, the Circuit Court of Appeals certified to this Court as a fact that that steamer was *actually seaworthy.* In the present case, it has gone no further than to certify that there was an *appearance* of seaworthiness in the *Folmina*, and that competent surveyors could not discover any defect.

3. In the *G. R. Booth*, the facts certified by the Circuit Court of Appeals excluded the hypothesis of negligence on the part of the carrier or his crew. In the present case, the Circuit Court of Appeals has only certified that the record contains *no evidence* showing negligence or fault on the part of the *Folmina's* crew.

No other point of difference between the two cases has been discovered.

Clearly, each one of the foregoing points of difference is one favorable to the libellants against the *Folmina* rather than to the libellants against the *G. R. Booth.*

In the *G. R. Booth*, this Court, in a carefully considered opinion by Mr. Justice Gray, answered the question certified by the Circuit Court of Appeals favorably to the cargo owners; *a fortiori* should this Court answer the present questions favorably to the cargo owners.

It is true that in the *G. R. Booth* the reasoning of this Court turns upon the proper application of the maxim *causa proxima non remota spectatur.*

The sea water which damaged the sugar on board the *G. R. Booth* was not regarded by this Court as the proximate cause because it was not the efficient cause of the damage; it was merely the weapon by means of which, the explosion inflicted its injury.

> "The damage to the sugar," said Mr. Justice Gray, "was an effect which proceeded inevitably and from absolute necessity from the explosion and must therefore be ascribed to that cause. * * * The inflow of the water seeking a level by the mere force of gravitation was not a new and independent cause, but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion" (171 U. S. 460).

A further illustration of the same principle is found in *The Thrunscoe* [1897] Prob. 301.

It follows equally clearly that sea water itself cannot be regarded as the efficient cause of the damage sustained by the rice on board the *Folmina;* that cause must be sought in those conditions or events which caused or permitted the *entrance* of sea water.

Surely the *Folmina* cannot justly argue that sea water was the efficient, the proximate cause of the cargo damage, because no other cause of that damage has been disclosed. For it is just as certain in the case

of the *Folmina* as in the case of the *Booth*, that there must have been an efficient agency or cause, permitting the sea water to enter. So long as that efficient cause remains undisclosed, the Courts cannot know whether the damage comes within the scope of the sea peril exception or not.

As it is the obligation of the carrier, upon fundamental principles, to bring the case within some contractual exception or statutory exemption from liability in order to exonerate himself, it follows that the *Folmina* must be liable and the questions certified by the Circuit Court of Appeals must be answered in the negative.

II.

Possible explanations of the entrance of sea water.

It may be useful to make a list of the different classes of hypotheses which might explain the entrance of sea water into an apparently seaworthy ship, where the proofs themselves offer no explanation.

The first four classes enumerated below are those in which the carrier would be liable; the last two are those in which the carrier would be under no legal liability:

1. Where sea water has entered the ship through some actual (but here undiscovered) structural defect existing at the inception of the voyage, with or without fault on the part of the shipowner or arising during the voyage (such as rust, ordinary wear, etc.), not due to a cause amounting to a sea peril.

The Caledonia, 157 U. S. 124.
The Carib Prince, 170 U. S. 655.
The Edwin I. Morrison, 153 U. S. 199.

2. Where sea water has entered through some mishap within the ship, not to have been anticipated and not due to the fault of the carrier or his servants: such as the chemical action upon the vessel's hull of cargo other than libellants' cargo, or such as the boring of some (possibly microscopic) animal or organism, resulting, in either case, in a very small aperture below the water line. The circumstances in the *G. R. Booth* would belong to the present class, except that there the cause of the admission of water would necessarily have been discovered by such an examination as was made of the *Folmina*.

3. Where sea water has entered through some fault on the part of the crew (here not disclosed in the proofs) in stowing or caring for cargo.

Knott v. *Botany Mills*, 179 U. S. 69.
The Germanic, 196 U. S. 589.

4. Where sea water has entered through some fault or error in navigation or in the management of the vessel; the owner not having used due diligence to make the vessel seaworthy and to supply a competent crew.

Int. Nav. Co. v. *Farr & Bailey Mfg. Co.* 181 U. S. 218.
The Southwark, 191 U. S. 1.
The Cygnet, 126 Fed. 742, 745.

5. Where sea water has entered through a marine casualty, amounting to a peril of the sea, such casualty here having escaped the notice of the crew and left no evidences behind.

6. Where sea water has entered through some fault or error in navigation, or in the management of the vessel, notwithstanding the use by the shipowner of due diligence to make the vessel seaworthy, and to supply a competent crew.

The Wildcroft, 201 U. S. 378.
The Silvia, 171 U. S. 462.

The damage to the rice involved in the present case may fall within any one of the first five of the foregoing classes. The possibility of a case under the sixth class is eliminated from consideration by the statement of facts and questions of law submitted by the Circuit Court of Appeals.

It is idle to argue that considering each class separately, it seems somewhat improbable (if all the witnesses were telling the truth) that the entrance of sea water into the Folmina presents a case in that particular class: for no other hypotheses than those above suggested can, it is believed, be presented to account for the entrance of sea water into the Folmina. And yet sea water *did* enter.

The hypothesis of sweat damage which was at one time urged by the carrier, had for its principal support the difficulty of explaining the entrance of sea water into the Folmina. But the sweat hypothesis, in turn, was even more difficult to accept upon the testimony of the chemical experts and others. It has, therefore, been definitely rejected and is not now before this Court.

The question submitted to this Court is essentially whether in the absence of better proof than this record presents, the hypothesis represented by class 5 (*supra*) ought to be accepted (as the carrier contends) and the preceding four hypotheses rejected.

It is respectfully submitted that the answer to this question is to be found in the same considerations as those upon which the insurer's liability of a common carrier, as a matter of historical development, was founded.

III.

Carriers should not escape liability for cargo damage without establishing clearly and satisfactorily the cause of damage and their right to exoneration.

> "The burden of proof lies on the carrier, "and nothing short of clear proof leaving no "reasonable doubt for controversy should be "permitted to discharge him from duties "which the law has annexed to his employ-"ment."
>
> *The Mohler*, 21 Wall. 230, 233.

A rule so well established should not be changed except by legislative enactment.

> *The Propellor Niagara* v. *Cordes*, 21 How. 7, 25.

When goods are entrusted to a carrier, the owner of the goods loses supervision over them; he is dependent entirely upon the carrier and the carrier's servants for any explanation that may be given as to the causes of loss or damage.

There are many carriers, no doubt, whose desire to avoid liability would in no event tempt them to compromise with their consciences. But there is unfortunately a numerous class of carriers who are only too prone to exaggerate and distort the facts in order to avoid legal liability, where there is virtually no possibility of exposure.

The legal rules defining a common carrier's liability have been adopted in order to give the cargo owner necessary protection against the latter class of carriers.

In the opinion delivered by Mr. Justice Brown in the case of *The Caledonia*, 157 U. S. 124, 144, it was said:

> "From reasons of public policy, and from "the fact that the carrier and his servants

"are solely entrusted with the custody of "goods carried, and the owner has no means "of protecting himself against their embez- "zlement or negligence, the law has imposed "upon the carrier the stringent liability of an "insurer. As was said by Lord Holt, in "*Coggs* v. *Bernard*, 2 Ld. Raym. 909, 918:

'This is a politic establishment contrived 'by the policy of the law, for the safety of 'all persons, the necessity of whose affairs 'obliges them to trust these sorts of per- 'sons, that they may be safe in their 'ways of dealing; for else these carriers 'might have an opportunity for undoing all 'persons that had any dealings with them, 'by combining with thieves, etc., and yet 'doing it in such a clandestine manner as 'would not be possible to be discovered. 'And this is the reason the law is founded 'upon in that point.' "

The fundamental danger to be guarded against by the courts in dealing with carriers was well stated by Lord Mansfield in *Forward* v. *Pittard* (1785), 1 Durnford & East, 27:

"By the nature of his contract he" (the car- rier) "is liable for all due care and diligence; "and for any negligence he is suable on his "contract. But there is something more by "the custom of the realm, that is, by the "common law; a carrier is in the nature of "an insurer. It is laid down that he is liable "for every accident, except by the act of God "or the King's enemies. Now what is the "act of God? I consider it to mean some- "thing in opposition to the act of man, for "everything is the act of God that happens "by his permission; everything by his knowl- "edge. But *to prevent litigation, collusion "and the necessity of going into circum- "stances impossible to be unravelled; the law "presumes against the carrier*, unless he "shows it was done by the King's enemies, "or by such act as could not happen by the "intervention of man; as storms, lightnings "and tempests.

"If an armed force come to rob the carrier

"of his goods, he is liable; and a reason is "given in the books which is a bad one, viz., "that he ought to have sufficient force to "repel it; but that would be impossible in "some cases, for instance, the riots in the "year 1780. The true reason is for fear it "may give room for collusion that the mas- "ter may contrive to be robbed on purpose "and share the spoil."

Best, *C. J.*, in *Riley* v. *Horne*, 5 Bing. 217, says:

"When goods are delivered to the carrier, "they are usually no longer in the eye of the "owner. He seldom follows or sends any "servant with them to their place of destina- "tion. If they should be lost or injured by "the grossest negligence of the carrier or his "servants, or stolen by them or by thieves in "collusion with them, the owner would be "unable to prove either of these causes of "loss. His witnesses must be the carrier's "servants, and they, knowing that they could "not be contradicted, would excuse their "masters and themselves." * * *

"From his liability as an insurer the car- "rier is only to be relieved by two things, "both *so well known to all the country* when "they happen, *that no person would be so "rash as to attempt to prove that they had "happened when they had not*—namely, the "act of God and the King's enemies."

Just as common carriers, aside from contractual stipulations, are liable to cargo owners as insurers, except in respect of losses due to acts of God or of the public enemy and in the event of loss, are required to show *affirmatively* that the loss was due to one of the two latter causes in order to escape liability; so also where the contract of carriage contains stipulations exonerating the carrier from liability in certain specific cases, the carrier should not be permitted to take advantage of these exceptions unless he clearly explains the causes of loss, so as to show with reasonable certainty that such cause is excepted by the contract. It is *only where a full*

explanation is given by the carrier that the cargo owner has any opportunity of disputing the carrier's theory of loss and of protecting himself against imposition.

If, for instance, the carrier points out the part of his vessel where sea water has effected an entrance, the vessel will be condemned for unseaworthiness in the absence of evidence that that very part of the vessel was examined at the beginning of the voyage and found to be in good condition.

The Edwin I. Morrison, 153 U. S. 214.

Is it possible that so serious and important obligation of the shipowner as that of proving due inspection of this part of his vessel can be evaded by simply pleading ignorance of the part where the sea water entered?

Although competent surveyors were appointed to examine the *Folmina*, it is impossible that they could have examined the entire vessel with that minute care and attention which would have been bestowed upon the particular portion (had it been known) where sea water effected an entrance.

If the carrier were only to point out the part of the ship where water entered, it would in most cases be easy, by an examination of that part, to determine whether the admission of water had been due to unseaworthiness or to a marine casualty coming within the definition of a sea peril.

The law should hold the carrier to make compensation for every cargo loss happening to the goods while in his custody unless he make full disclosure of the circumstances attending the loss, and, in any event, sufficiently to show the nature of the act or occurrence to which the loss was due.

In the case of the *Mascot*, 48 Fed. 119; 51 Fed. 605, Judge Brown said:

> " All that the claimant can do to exonerate
> " the ship has doubtless been done; and after
> " all, the evidence shows nothing more than
> " that they cannot explain how the stains and

"defacing occurred. It negatives certain "causes that might under some circumstances "have produced the damage; but this is not, I "think, sufficient to release the ship from her "legal obligation. * * *

"The burden of showing that the damage "*arose* from such an excepted cause is upon "the ship (*Nelson* vs. *Woodruff*, *1 Black*, *156*). "As the *Mascot's* evidence does not show this, "*but merely leaves the damage unexplained*, "I must therefore hold the ship liable for this "item."

In *The Peter der Grosse*, 3 Asp. M. C. 195, neither party was able to explain a taint that had befallen a shipment of feathers. The carrier offered affirmative evidence that there was no condition on the ship that could have produced the result, just as here the *Folmina* has offered certain evidence in the hope of supporting the inference that there was no defect that could have permitted sea water to enter. The defence of the *Peter der Grosse*, for want of an explanation of the damage, was held insufficient by the Court of Appeal. The defence of the *Folmina* is no better.

See also *The Martha*, Olc. 140; F. C. No. 9145 (Betts, *J.*, 1845), and cases on pp. 21-25, *infra*.

The obligation of the carrier to explain fully the circumstances attending cargo losses has been uniformly insisted upon both in England and in this country for many generations.

Scarcely a case will be found (if, indeed, any case at all) in which a carrier has succeeded in escaping liability for damage to cargo without giving an explanation under which, either directly or indirectly, he has shown with reasonable clearness that the loss was of the excepted character; or if a "sea peril" exception was relied upon, that the damaged condition resulted from some described marine casualty or accident.

Once the carrier is able to show with the requisite degree of clearness that the damage is of an excepted character, the prevailing rule is that he need go no further to establish affirmatively that he was free from negligence in the premises; the shipper in this event having the burden of proving negligence. *Clark* v. *Barnwell*, 12 How. 272.

Nevertheless, there is a very respectable body of authority to the effect that even in this case it is contrary to public policy to impose upon the cargo owner a burden of proof which he is, from his inherent position, so ill adapted to bear:

Pittsburgh, &c., R. Co. v. *Racer*, 5 Ind. App. 209.

Tardos v. *Toulon*, 14 La. Ann. 429.

J. Russell Mfg. Co. v. *New Haven Steamboat Co.*, 50 N. Y. 121.

Mitchell v. *Carolina Cent. R. Co.*, 124 N. C. 236.

Pennsylvania R. Co. v. *Miller*, 87 Pa. St. 395.

Johnstone v. *Richmond, &c., R. Co.* 39 S. C. 55.

Alabama Gt. Southern R. Co. v. *Little*, 71 Ala. 611.

Central, &c., Co. v. *Hasselkus*, 91 Ga. 382.

Adams Express Co. v. *Stettaners*, 61 Ill. 184.

Louisville, &c., R. Co. v. *Thompson*, 13 Ky. L. Rep. 973.

Mahon v. *Steamer Olive Branch*, 18 La. Ann. 107.

Hinton v. *Eastern R. Co.*, 72 Minn. 337.

Southern Express Co. v. *Seide*, 67 Miss. 609.

Crow v. *Chicago, &c., R. Co.*, 57 Mo. App. 135.

Union Express Co. v. *Graham*, 26 Ohio St. 595.

Turney v. *Wilson*, 7 Yerg. (Tenn.) 339.
Brown v. *Adams Express Co.*, 15 W. Va. 812.
Kirst v. *Milwaukee, &c., R. Co.*, 46 Wis. 489.
Texas, &c., R. Co. v. *Richmond*, 94 Tex. 571.

IV.

Unexplained sea water damage to cargo is not of itself a sea peril, however seaworthy the vessel may appear.

1. The carrier's position in this case is that mere damage by sea water is sufficient to constitute a sea peril where the carrier has done what seems reasonable to ascertain the cause of the entrance of sea water and has been unable to find such cause.

Suppose a vessel leave port with a latent defect not discoverable by any reasonable means, either at the beginning or at the end of the voyage, and that by reason of such defect sea water necessarily enters. Under the contentions of the *Folmina* such an influx of sea water must be regarded as a sea peril, because all reasonable efforts have been made, without success, to discover the defect in the vessel or a marine casualty adequate to explain the result.

But it is well settled that a sea peril is something which may, not which must happen. It is something fortuitous, unforeseen.

Mr. Justice Story, in *The Reeside*, 2 Sumner, 567; F. C. No. 11,657, says the phrase "danger of the seas" must

> "be clearly understood to include only such
> "losses as are of an extraordinary nature or
> "arise from some irresistible force or some

"overwhelming power which cannot be
"guarded against by the ordinary exertions
"of human skill and prudence."

This is the accepted definition in this country:

The Warren Adams, 74 Fed. 413, 415.
Ins. Co. v. *Easton & M. Transp. Co.*
97 Fed. 653.

2. To say that the unexplained wetting with sea water of cargo in an apparently seaworthy ship is of itself a sea peril (as, the *Folmina* must argue, the first question certified should be answered), is to confuse a condition with a cause.

No doubt it is competent for carriers to exempt themselves from liability for losses of a particular *character;* that is, losses in respect of cargo of a particular nature or description, such as the damage incident to "breakage" or "rust" or "decay." The loss having been shown to be of that character, the carrier's exoneration follows presumptively; the shipper has the burden of avoiding the effect of the exemption."

The "sea peril" exception, on the other hand, does not apply to a character or description of damage, but to a *cause* of loss. The carrier cannot escape liability without satisfactorily tracing the causal connection between the damaged state of the goods and the sea peril.

The distinction between the two classes of exceptions is emphasized in *The Henry B. Hyde* and *The Lennox* (*infra*) and *The Patria* (*supra*).

In *The Henry B. Hyde*, 90 Fed. 114, 116, a libel for damage by breakage was dismissed; the bill of lading exempted the ship from liability for "breakage" and there was no proof of the cause of breakage. Judge Gilbert for the Circuit Court of Appeals for the Ninth Circuit, makes it clear that in the opinion of that Court, the exception of "breakage"

differs from the exception of "sea peril" in that the *mere condition* of the goods will bring the carrier presumptively within the protection of the exception of "breakage" but not within protection of that of "sea peril." The Judge says:

> "The ship was not accountable for breakage. There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which excepted liability. In this respect, the case differs from some of those which are cited by the appellants, such as cases where the carrier had stipulated against loss by the perils of the sea. *The Giava*, 56 Fed. 243; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413. In such a case the duty rests upon the carrier to show that the damage *resulted* from the perils of the sea. In the present case the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability. The burden of proof, therefore, rested upon the libellants to establish by the evidence that the breakage occurred through the negligence of the ship's employes."

The same distinction was recognized by Judge Brown of the Southern District of New York in the case of *The Lennox*, 90 Fed. 308, 309. The Judge says:

> "Where a loss arises from one of the excepted perils" (in that case breakage), "the ship is *prima facie*, excused. She can only be held upon affirmative proof that some negligence on her part was the efficient cause of the loss. * * * Conversely, where the loss is not by an excepted peril, the carrier takes the risk of explaining the cause of damage and of proving it to be a sea peril. It is insufficient for him to negative certain causes of loss. If on the whole the damage is unexplained, the ship in such case remains liable because she has taken that risk."

The language in *The Patria* was:

> "It is, no doubt, the rule, as appellant contends, that *when the damage is manifestly of the sort excepted*, the ship is under no obligation to show the promoting cause. To illustrate: if the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the *sole damage* to the cargo in the case at bar were *manifestly decay*, and the language of the exception were, as the respondent states in his brief, 'for decay caused by inherent defect,' the ship would have the burden of showing that the decay was caused by inherent defect.' If, however, the sole damage was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damages occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed."
>
> *The Patria, 132 Fed. Rep. 971, 972.*

3. There is no lack of decided cases where the Courts have declined to consider mere sea water damage as presumptively due to a sea peril.

In the case of *The Svend* (*Richards* v. *Hansen*) 1 Fed. 54, Mr. Justice Clifford held the carriers liable for damage by sea water to certain bundles of sheet iron. While the evidence was sufficient to show negligence in protecting the goods, it is evident from a perusal of the opinion that the learned Justice does not consider that the fact of such wetting with sea water is sufficient presumptively to consti-

tute a sea peril, so as to cast upon the shippers the burden of proving some fault of the carrier in permitting sea water to obtain access to the sheet iron. Mr. Justice Clifford says:

> "Sufficient also appears to show that the "goods, when shipped, were in good order and "condition, and that the covenant of the bill "of lading is that they shall be delivered in "like good order and condition. One thousand "bundles of the shipment, stowed in the for- "ward part of the aft lower hold, were badly "wet with salt water to such an extent that, "when the bundles were hoisted out to be "delivered, the water dripped out of the same "and appeared muddy with rust" (p. 55).
>
> "Dangers of the seas, said Judge Story, "whether understood in its most limited sense "as importing only a loss by the natural acci- "dents peculiar to that element, or whether "understood in its more extended sense as "including inevitable accidents upon that "element, must still in either case be clearly "understood to include only such losses as "are of an *extraordinary nature*, or arise "from some *irresistible force* or some over- "whelming power which cannot be guarded "against by the ordinary exertions of human "skill and prudence. *The Reeside*, 2 Sum. "571" (p. 61).
>
> "Where goods are shipped and the usual "bill of lading given, promising to deliver "the same in good order, the dangers of the "seas excepted, without more, and they are "found to be damaged, the *onus probandi* "is upon the owners of the vessel to show "that the injury was occasioned by one of "the excepted perils" (p. 62).

In *Bearse* v. *Ropes*, 1 Sprague, 331, F. C. No. 1192, certain hemp sustained damage of two different sorts: damage by oil and damage by sea water. Judge Sprague says:

> "It is insisted, indeed, on behalf of the "carrier that if he took the usual care and "precautions and conveyed these goods in "the usual manner" (including, of course, the

supplying of a seaworthy vessel), "he is not "responsible for damage whether arising "from danger of the seas or otherwise. To "this I cannot accede. In order to exonerate "himself from liability, he must bring him- "self within the exceptions of the bill of lad- "ing and show that the damage *arose* from "the danger of the seas."

The Zone, 2 Sprague, 19, F. C. No. 18,220, was a case of unexplained sea-water damage to a shipment of almonds. Says Judge Sprague:

"The burden of proof is, then, on the claim- "ants to show what caused the damage. "Theories may be formed as to the cause of "damage, and one theory which is no more "probable than another is that water may "have got in the between-decks during the "voyage. It must be borne in mind that one "of the reasons for casting the burden of proof "of the cause of damage (after the damage "itself has been shown) upon the shipowner "is that as to what takes place during the "voyage *no one except his agents can testify.* "This burden of proof does not allow of the "conclusive inference that the damage must "have arisen before shipment, *because the "ship was tight and well dunnaged*, and that "the ship owner will be relieved of his lia- "bility by such inference. The burden of "proof requires that the owner should go "farther and satisfy the Court that the dam- "age *arose* from one of the causes excepted— "anything short of this will not relieve his "responsibility. I cannot see that the claim- "ants have done this, *because my mind is left "in a state of uncertainty as to the cause of "damage, and I therefore must order a de- "cree to be entered for the libellants.*"

In *The Queen*, a mysterious leak developed in a seaworthy vessel. Says the Court:

"Has the carrier removed the presumption "of negligence cast upon him by the return "of the merchandise in a damaged condition, "wet with sea water? Was it sufficient to

"shift the burden of proof back upon the "shipper for the carrier to show that the ves- "sel was in a seaworthy condition at the com- "mencement of the voyage? * * * I "think not. The carrier does not thereby "overcome the presumption of negligence "which the law raises against him. *He can- "not absolve himself from blame by merely "showing such a state of facts that the Court "is unable to deduce how and in what man- "ner the damage has arisen.* He must show "affirmatively that the damage was *caused* "by peril of the sea or other cause excepted "on the contract of affreightment, and this "he must establish satisfactorily. He cannot "leave the matter in doubt."

The Queen, 78 Fed. 155, 165, 168; affirmed 94 Fed. 180, 196.

In the case of *The Centennial*, 7 Fed. 601, a cargo of sugar sustained serious damage from sea water. The Court found that the cargo was properly stowed and well dunnaged, and that the schooner was sufficient and suitable for the voyage. Cargo damage was due to an unexplained admission of water into the hold of the vessel, with which the pumps of the vessel proved unable to cope. Among the findings of fact made by Judge Lowell is one

"that the claimants" (the shipowners) "have "failed to prove distinctly that the damage "to the cargo was caused by perils of the "sea."

It is quite clear from the opinion that proof of seaworthiness and of good stowage, coupled with damage by sea water, was insufficient in the Judge's mind to make the case one presumptively of damage by a sea peril.

In the case of *The Lydian Monarch*, 23 Fed. 298, certain bales of burlaps were damaged by sea water, Judge Nixon says:

"The bill of lading acknowledging that "the burlaps was delivered to the steamer in "good order and condition, and the proofs "showing that it was damaged by sea water,

"it is incumbent on the respondent to prove
"that the loss was occasioned by perils of
"the sea. Failing in this, the company is
"liable for the damage sustained."

In the case of *The Compta*, 4 Sawyer, 375, F. C. No. 3069, a libel was filed to recover damages for injury to certain goods admittedly damaged by sea water. The ship defended under the sea peril exception and proved considerable heavy weather. Says Judge Hoffman:

"From the foregoing it may, I think, rea-
"sonably be concluded that the weather
"experienced by the vessel was such as might,
"possibly, have produced, on a stanch and
"seaworthy ship, the effects attributed to it
"by the claimants. But that it was not
"of such unusual and extreme sever-
"ity as to justify the assumption, with-
"out further evidence, that it caused
"the leaks which occasioned the dam-
"age. The carrier, to make good his
"defense, is bound to show that the damage
"arose from a sea peril. It is not enough for
"him to show that it might have arisen from
"that cause. He must prove that it did.
"This proof can be afforded either by show-
"ing a sea peril of such a character that
"injury to the vessel, however stanch and
"seaworthy, would be its natural and neces-
"sary consequence; or, by the direct testi-
"mony of those who observed its effect upon
"the ship; or, by proving her condition on
"her arrival; or, he may exclude every other
"hypothesis of causation by satisfactory
"proof that she was tight, stanch and sea-
"worthy at the commencement of the voy-
"age."

To the same effect:

The Sloga, 10 Ben. 315; F. C. 12,955.

The Phœnicia, 90 Fed. 116, 119; 99 Fed. 1005.

Ins. Co. v. *Easton & M. Transp. Co.*, 97 Fed. 653.

The Presque Isle, 140 Fed. 202, 205.

4. It is not, of course, contended that the carrier relying on the "sea peril" exception, must always show *directly* and explicitly by his proofs a loss by a marine casualty or accident. Such losses may well be shown with sufficient clearness indirectly by substantial evidence. An inference of loss by sea peril was very properly drawn in the case of *Hooper* v. *Rathbone*, Taney, 519; F. C. 6676, from convincing evidence of seaworthiness and *stress of weather*. In this case it was shown that sea water was admitted during a storm, although a storm

> "not violent enough to dismast her or carry
> "away her sails."

Her pumps became choked and she was compelled to put into a port of refuge. The ship was

> "proved to have been among the strongest
> "ever built in Baltimore. Yet this ship,
> "strong as she was, had been so strained by
> "the rough weather to which she was ex-
> "posed that she leaked considerably more
> "than at the beginning of the voyage and re-
> "quired a good deal of caulking in her upper
> "works to enable her to proceed from St.
> "Thomas to Liverpool."

Mr. Justice Taney was clearly justified in attributing the entrance of sea water to the storm, but there is not one line in the opinion to suggest that he considered the mere non-negligent presence of sea water in a seaworthy ship as of itself a sea peril. And the case has heretofore been understood as announcing a doctrine of precisely the opposite character.

The Queen of the Pacific, 75 Fed. 74, 78.

The Lydian Monarch, 23 Fed. 298, 299.

V.

The English decisions would not relieve the Folmina from explaining the entrance of sea water.

Certain decisions in England have no doubt been very liberal to the carrier in defining the scope of a "peril of the sea" as the phrase is used either in a marine insurance policy or in a bill of lading.

The Xantho, 12 App. Cas. 503.
Hamilton v. *Pandorf*, 12 App. Cas. 518.
Blackburn v. *Liverpool, Brazil & River Plate Steam Nav. Co.* (1902) 1 K. B. 290.
The Southgate (1893), Prob. 329.
The Cressington (1901), Prob. 152.
The Glendarroch (1894), Prob. 226.

Liberality towards carriers is not unnatural in a nation composed largely of ship owners, by whose courts even negligence clauses have been sustained as valid.

In each of the foregoing cases, the cause which operated to admit the sea water was clearly and satisfactorily established by the carrier.

In *The Xantho*, the possibility of being run down and sunk by another vessel negligently navigated was held to be a peril of the sea within the meaning of the bill of lading. Lord Herschel says:

> "I am aware of only one case which "throws a doubt upon the proposition that "every loss by the incursion of the sea due "to a vessel coming accidentally (using that "word in its popular sense) into contact "with a foreign body which penetrates it "and causes a leak, is a loss by the peril of "the sea."

In *Hamilton* v. *Pandorf* (*supra*), rats had gnawed a lead pipe connecting with the bathroom of the steamer Inchrhona. In this manner, water after-

wards entered from time to time and damaged cargo, the suit being instituted on behalf of the latter under the bill of lading. Two of the Judges (Bramwell and MacNachten) approved a decision which had been made in the lower Court by Lopez, *J.*, 16 Q. B. D. 629, 633, in which that Judge had said:

> "In a seaworthy ship, damage to goods "caused by the action of the seas during "transit, not attributable to the fault of any- "body, is, in my opinion, 'a danger or "'accident of the sea' intended to come "within the exception and exonerate the "shipowner. It is clear that the action of "the sea itself is one of the causes contem- "plated."

The favor which this too general and somewhat undiscerning dictum (which evidently did not receive the concurrence of Lord Esher, 17 Q. B. D. 670, 681) nevertheless received in the House of Lords, is to be explained by the fact that the House of Lords on that particular day was principally interested in overruling an erroneous legal theory theretofore prevalent: the theory that in determining liability under policies of insurance, the courts will regard the *causa proxima* in the narrow and literal sense of that expression; whereas in construing a bill of lading the courts will regard the *causa causans*, or antecedent cause—that is, the negligence, if any, of the crew of the vessel in making the marine peril operative.

In *The Xantho, supra*, decided almost concurrently with *Hamilton v. Pandorf*, this fallacy was definitely corrected. The case of *Woodley v. Michell* (1883), 11 Q. B. D. 47, which it reversed, had been decided upon the theory that, while a collision between the two vessels might be the *causa proxima* of the cargo damage, the *causa causans* was the negligence of the non-carrying vessel, and that in a bill of lading suit the *causa causans* only must be

regarded; that, therefore, the sea peril clause of the bill of lading was not operative.

The House of Lords, although putting itself squarely upon record as holding that the phrase "sea peril" has the same meaning in a bill of lading as in a policy of insurance, does not in either of those cases abandon the point of view that in determining what is a *causa proxima* the order of time is to be regarded rather than the importance or efficiency of the particular cause that produces the loss. It is, therefore, pleased to regard the mere influx of water as the *causa proxima* instead of the agency by means of which the opening in the ship's side may be brought about.

But there is nothing in these cases to encourage the view that a carrier may leave the mode of entrance of sea water into a ship entirely a mystery and still escape liability on the theory that such a loss is, *prima facie*, a sea peril.

Under the English rule, as stated in these cases, the burden is still on the carrier to satisfy the Court that the sea-water did not enter the ship through any defect of the ship constituting unseaworthiness or through any unexcused default on the part of the carrier. If the carrier does not explain the manner in which sea-water entered, the inference of seaworthiness cannot, in most cases, safely be drawn; for the most skillful and experienced surveyors are subject, like other men, to the imperfections of the human senses.

In *Hamilton* v. *Pandorf*, the carrier had, in fact, assumed the burden of proving, and had proved, the exact cause of the entrance of water, namely, the action of rats. He showed the orifice through which the water entered. The cargo owner had the fullest opportunity of verifying the carrier's story and of being satisfied that the vessel was seaworthy.

The fundamental difference between the case of *Hamilton* v. *Pandorf* and the present case is that

there, the entrance of sea water having been fully explained, and shown to be due to a cause consistent with the vessel's original seaworthiness, there was no circumstance left in the case to challenge the conclusion to be founded upon testimony of the ship's witnesses to the effect that upon such examination as they were able to give, the vessel appeared to be seaworthy.

In the *Folmina*, the evidence that competent men searched for defects and found none is squarely met and balanced by the admitted fact that sea-water *did* enter the vessel, and that they have not been able to explain or to suggest an explanation for such entrance, consistently with their hypothesis of seaworthiness.

But absolute seaworthiness is something that all possible care and diligence may sometimes fail to secure; it is something the lack of which the most scrupulous examination may sometimes fail to disclose.

The Edwin I. Morrison, 153 U. S. 199, 210.
The Carib Prince, 170 U. S. 655.

The burden of proving seaworthiness is upon the carrier.

The Wildcroft, 201 U. S. 378.

It does not follow that because damage due to unseaworthiness may have become apparent, the defect constituting unseaworthiness must also become apparent. It may still remain latent and undiscoverable.

While the discovery of defects may establish unseaworthiness, *an unsuccessful attempt to discover defects cannot establish seaworthiness.* The latter can only be inferred, for the purpose of judicial decision, from the circumstances of each case.

Steele v. *State Line S. S. Co.* 3 App. Cas. 72.

The four minor English cases mentioned above (p. 27), turn upon the peculiar doctrine of the English law which treats a negligent carrier as innocent where his bill of lading contains a negligence clause. *Liverpool Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 447. They can have no possible influence upon the development of law in this country.

The Saratoga, 20 Fed. 869, 872.
The Reeside, 2 Sumner, 567, 571.
The Titania, 19 Fed. 101.

VI.

The only inference properly drawn from the facts certified is that sea-water entered the *Folmina*, not owing to any sea peril, but owing to the steamer's latent unseaworthiness or owing to some undiscovered internal mishap similar to that which occurred in the case of *The G. R. Booth* or owing to some other cause for which the steamer is liable.

The possibilities of the situation, as they appear to us, have already been stated (pp. 9-10, *supra*).

The carrier having the burden of explanation, the legal inference from failure to explain is that sea-water found entrance to the hold of the *Folmina* owing to some cause for which the carrier is legally liable.

Nelson v. *Woodruff*, 1 Black 156, 160,
The Warren Adams, 74 Fed. 413, 414.

The inference of unseaworthiness as the explanation of the entrance of sea water is not in the least inconsistent with the certificate of the Circuit Court of Appeals, which refers to the *Folmina* as only ap-

parently seaworthy (First question submitted). Even an unseaworthy vessel would be entitled to rely upon the protection of bill of lading exceptions, if it could be shown that there was no causal connection between the cargo damage and the unseaworthiness.

The Caledonia, 157 U. S. 124, 132, 136.
Carver, Carriage by Sea, Sec. 17.

VII.

The questions certified to this Court by the Circuit Court of Appeals for the Second Circuit should be answered in the negative.

Respectfully submitted,

WALLACE, BUTLER & BROWN,
Proctors for Libellant.

FREDERICK M. BROWN,
Advocate.

[redacted]

SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

GUSTAVE A. JAHN, *et al.*,
Libellants-Appellants,

vs.

STEAMSHIP *Folmina*,
WILLIAM VAN EYKEN,
Claimant-Appellee.

No. 84.

BRIEF FOR THE FOLMINA.

This cause comes before this court on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The certificate states that the cause came before the Circuit Court of Appeals on an appeal from a decree of the District Court for the Eastern District of New York, dismissing a libel, and that upon the hearing of the appeal, questions or propositions of law arose concerning which it desires the instruction of the Supreme Court. The Court thereupon stated the facts and certified the questions as follows:

"STATEMENT OF FACTS.

The facts upon which the questions arise are as follows:

"The S. S. *Folmina* sailed from Kobe, Japan, for New York with a large shipment of rice on board, in No. 3 hold under a bill of lading which exempted the carrier from 'The Act of God * * * loss or damage from * * * explosion, heat, or fire on board * * * risk of craft or hulk or trans-shipment and all and every the dangers and accidents of the seas, rivers, and canals and of navigation of whatever nature or kind.' It further provided that the ship 'is not liable for * * * sweat, rust, decay, vermin, rain, spray.'"

"The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

"A majority of the court are satisfied that the damage was caused by sea-water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

"The *Folmina* was a steel steamship of the highest class in Lloyds' Register. Before starting for Japan she was in drydock at New York and was there surveyed by Lloyds' surveyor. Some time before she had been in drydock at Cardiff, where some repairs were made to the rudder, rudder-quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

"During and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with No. 3 hold, and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants and their underwriters and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side-plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence (other than the mere circumstance that the damage was by sea-water—if that be considered evidence) was found that there had been leaks in any part of the frame, structure, side plating, riveting, pipes or appurtenances of the ship, through which water might have reached that part of No. 3 hold where the damage was done. No adequate means of access of sea water were found, nor any defect in the steamer which then appeared to be seaworthy.

"QUESTION—CERTIFIED.

"Upon the facts above set forth, the questions of law concerning which this Court desires the instruction of the Supreme Court are:

"1. Whether damage to the cargo of an apparently seaworthy ship through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of the bill of lading exception above quoted?

"2. Whether the ship is relieved from liability in consequence of said exception?

"In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, establishing Courts of Appeal, the foregoing question of law is by the Circuit Court of Appeals of the United States

for the Second Circuit, hereby certified to the Supreme Court.

"New York, May 7th, 1907.

E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge."

The decision of Thomas, *J.*, dismissing the libel in the District Court is reported in 143 Fed. Rep., 636.

The opinion of the Circuit Court of Appeals, affirming the judgment of the District Court, is reported in 153 Fed. Rep., 364.

Subsequently, the libelant moved for a re-argument or, in the alternative, that certain questions of law be certified to this Court; and one of the Circuit judges, being of opinion that the damage was caused by sweat, and the other two being divided in opinion as to the correctness of a *dictum* in one of their previous decisions, as to the meaning of an exception of "damage caused by peril of the sea," 153 Fed. Rep., at p. 366, the questions appearing in the certificate were certified.

FIRST POINT.

THE QUESTIONS CERTIFIED ARE PREDICATED ON THE ASSUMPTION THAT THE STEAMSHIP WAS SEAWORTHY AND THAT THE DAMAGE TO THE CARGO OCCURRED WITHOUT THE FAULT OF THE MASTER, OFFICERS OR CREW.

The appellants contend that there is no finding

by the Court of Appeals, one way or the other, on the questions of seaworthiness; and that the statement that there is no proof of negligence on the part of the carrier, is merely negative. From these premises it is argued that inferences should be drawn by this Court that the damage may have been due to unseaworthiness or to negligence.

The language of the certificate does not justify the construction put upon it by the appellants.

The statement that "there was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew," is a finding, for the purposes of the certificate, that there was no such negligence, fault or error. Inferences from the facts and circumstances in evidence are a species of proof, and a finding that there was no evidence tending to show any negligence, fault or error, is a finding that no inferences of negligence existed.

On the subject of seaworthiness the certificate is equally conclusive. It states that the *Folmina* was a steel steamship of the highest class in Lloyds' register; that before starting for the round voyage to Japan and return she was in drydock at New York, and was there surveyed by Lloyds' surveyor; that some time before she had been in drydock at Cardiff, where some repairs had been effected; and that the master testified to the general good condition of the steamer at the time she sailed from Kobe.

What had been done before the vessel sailed from Kobe was evidence of care on the part of the owners in the maintenance and upkeep of the vessel.

In the absence of anything to the contrary the testimony of the master of the actual good condition of the steamer on leaving Kobe established such good condition. The actual condition of the vessel at that time means seaworthiness.

The statements that "during and after delivery of the cargo the main deck, the between deck, the pipes leading to or connected with No. 3 hold and the shell plating in the wing of No. 3 hold (where the damage occurred) were carefully examined by the officers of the ship, by surveyors representing libelants and their underwriters, and that it was afterwards examined by competent and experienced surveyors representing both parties," that "the decks, hold, side plating and rivets of the ship were found to be sound, intact and free from leaks"; and that "no adequate means of access of sea-water were to be found, nor any defect in the steamer, which then appeared to be seaworthy"; when considered in connection with the finding that the steamer was in good condition at the beginning of the voyage, can only mean that the vessel was actually seaworthy under the facts here.

The examination by competent surveyors, and their inability to find any defect, negatives the possibility of unseaworthiness. The fact of damage alone could not justify an inference of unseaworthiness. The production of proof as to good condition, both at the beginning of the voyage by the master, and at the end of the voyage by the surveyors, leaves no room for presumptions. A presumption properly exists only in the absence

of proof as to circumstances with respect to which, in the absence of proof, a presumption might have been indulged.

The existence of a possible latent defect is negatived by the proofs, because examinations of the vessel both before and after the damage failed, according to the statements, to discover any defect. A latent defect means a real defect discovered after the loss to which defect the loss is traced. The certificate specifically states that no such defect was found.

The appellee accordingly maintains that the questions certified are based upon findings that the ship was seaworthy; that the loss occurred without the negligence or fault of the ship's officers or crew; that the language of the certificate is intended to present merely the legal question whether the entrance of sea-water into a seaworthy ship without the fault of the ship's officers or crew in some manner which could not be explained, was "a danger or accident of the sea or of navigation."

Though the statement of facts in the certificate is incomplete and the first question perhaps does not fully indicate the hypothesis on which it is based, yet, the true intent and scope of the questions propounded will be made clear by reference to the opinions delivered in the courts below.

The issues raised by the pleadings appear in the opinion of Judge Thomas. *The Folmina,* 143 F. R., 636. The libel charged that the rice was "wet with seawater" when delivered; but there was no

averment that the wetting arose from the unseaworthiness of the ship. The claimant pleaded the exceptions contained in the bill of lading, part of which appear in the certificate. 143 F. R., at p. 637.

The District Judge stated in great detail the manner of stowage, the part of the hold in which the damaged rice was found, and the character and extent of the damage. The learned judge then, at p. 637, continued:

"The evidence shows that the damage was caused by sweat and heat, or sea water and consequent heat. For some purposes of discussion let it be assumed that sea water entered and injured the cargo. Yet the evidence shows that it did not enter by reason of any negligence on the part of the master or crew, or of the carrier in outfitting the ship for the voyage. Hence, the invasion of the sea was beyond the cognizance or avoidance of the carrier or his servants, and without the fault of either. What was demandable of owners or crew to keep out water they did. There was upon arrival at New York no defect in the ship that accounted for the sea water. None was discovered during the voyage, whose history also shows that the crew by culpable action or omission did not suffer it to enter. Hence, when the libelant charges receipt of sound goods and delivery of the same injured by sea water, the carrier shows that neither he nor his servants were negligent in connection with the suggested injurious cause.

"The rule that when the fact is in doubt, or the court is in doubt as to the fact, the burden is on the carrier to solve the doubt, has been fully met.

"The carrier points to a sound ship, to which sea water could not gain access, and shows the

existence of such condition during the voyage, and due preparation of the ship for the protection of the cargo, and ample care during the voyage. Satisfactory and uncontradicted evidence that no defect discoverable in the exercise of requisite care existed between the receipt and discharge of the cargo is maximum proof. Evidence can produce no higher probative effect.

"Pass in review the variety of ways that sea water could enter, and the carrier's evidence meets them one by one, and negatives not only the presence of every such opportunity, but also any negligence that would permit it. Both the fact and fault permitting its existence are absent. Immediately one suggests any practical way for sea water to enter, for instance around the scupper pipe, the ship is shown to have been sound in such respect. Was the way through a yielding plate? Not a strained or started rivet or a strained plate justifies even suspicion. Was the entry through the ventilators or hatches? They are shown to have been closed during all weather that would permit it, and the sound condition of the hold spaces and other cargo disputes the possibility. Yet the libelants persist that the ship should, to free itself, make further disclosures. Why? Conjecture even as to the case has been exhausted, and the carrier to such limit has shown his innocence. Neither imagination nor experience suggests any way for the sea water to enter that is not negatived, or at least the evidence shows that the carrier did not contribute to it. Hence, the highest and most comprehensive proof has been reached.

"When it appears that the carrier not only used due diligence to furnish a seaworthy ship, but did actually furnish the same, that he used proper care in stowing the cargo, that his servants did not, by undutiful act or omission, suffer

the cargo to be injured, that no defect was discovered during the voyage, and none existed at its termination, the carrier and his servants at least, are not chargeable with negligence.

"Neither is the carrier in this case liable as an insurer, for he expressly stipulated against damage from sea water, to which was impliedly attached the proviso that his own and his servants' fault did not aid or suffer the same. Now the absence of the fault has been shown. Hence the proviso has been met and the stipulation for exemption takes effect. There may be some mystery about the damage. There would be none if the fact were that sweat and heat caused the injury, and there would be no difficulty in finding that as a fact, if the report of the libelants' analysis had not shown an undue proportion of salt in the bags and injured rice. The claimant's contention, that the rice absorbed the remnant of mineral salt on an earlier voyage carried in the same hold, may have some value. If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities, as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship, strongly aids the evidence that it did not enter. But that is left undecided.

"If the injury was the result of sweating, heat, or natural decay due to the inherent and natural condition of the goods, the ship is not liable, unless the act or omission of the owner or his servants intervened to incite or to aid such cause, which is not the case. *Clark* v. *Barnwell,* 12 How., 282; *The Prussia,* 93 Fed., 837, 840.

"If the injury arose from sea water, without the carrier's fault, he is released by the stipulation, provided he shows that fact. *Clark* v. *Barn-*

well, supra; Transportation Co. v. *Downer,* 11 Wall., 129. *Cau* v. *Texas and Pacific Ry. Co.,* 194 U. S., 427. The evidence shows that it did arise either from heat and sweat, or sea water and consequent heat. Hence, the case is within the exception, and in either alternative the evidence exculpates the ship. In the present case the ship, from physical examination, appears to have been absolutely seaworthy at every stage of the adventure. To this it is answered that she was not seaworthy when and where the assumed seawater entered; and to this it is replied that the owner and his servants used diligence respecting every part or equipment whereby water, by any conjecture, could enter. Considering the recent construction of the vessel, her use and care after construction, the dry docking in New York preliminary to her eastern voyage, the inspection and care of the hold before the rice was loaded, the fact that she appeared in perfect condition upon her arrival, even to the degree that not a single suspicious condition appeared, all this points to but one conclusion, that the owners or their agents used due care in sending her out from Japan, and the crew discovered no defect on the way, and that no defect was discoverable. It does not seem just to condemn a ship with such a history.

"The decision is placed upon the ground that the facts show that the ship was not negligent, although the Supreme Court has decided in *Clark* v. *Barnwell, supra; Transportation Co.* v. *Downer, supra; Cau* v. *Texas & Pacific Ry. Co., supra,* that when the carrier shows that a sea peril, in this case sea water, within the exception of the bill of lading, did the damage, the burden is upon the shipper to prove that the carrier's negligence intervened."

The opinion of Judge Thomas shows that the question of the seaworthiness of the vessel was

thoroughly dealt with at the trial, and that the most searching examination by surveyors of the highest competency, representing both parties, who examined the ship separately and collectively, failed to discover the slightest evidence of unseaworthiness.

"The test of seaworthiness," as stated by Mr. Justice Gray in *The Silvia*, 171 U. S., 462, 464, "is whether the ship is reasonably fit to carry the cargo which she has undertaken to transport."

The testimony detailed by Judge Thomas clearly showed that the ship was seaworthy within the meaning of this rule, and in his opinion, if the loss was by sweat, it was specifically excepted by the bill of lading, and if it was by sea water it was, under the facts of the case, within the exception of "dangers and accidents of the seas * * * and of navigation."

While the *per curiam* opinion of the Court of Appeals, 153 F. R., 364, indicates that no two of the judges who heard the case agreed as to the grounds on which the decision should be affirmed, yet neither one of the two who were for affirmance, nor the judge who was for reversal, intimated the slightest doubt as to the reasonable fitness of the ship for the voyage.

The complete opinion of the Court of Appeals, 153 F. R., at p. 365, which details the differences of opinion between the judges, is as follows:

"The opinions of the three members of the

court upon the questions presented in this case are so discordant that no good purpose will be served by any detailed statements of the reasons by which they reach their several conclusions: It will be sufficient to indicate what those conclusions are.

"Evidently the conclusion of the district judge was arrived at by first determining upon whom the burden of proof rested. And it would seem that in determining that preliminary question he assumed that the bill of lading stipulated against damage by 'sweat' and damage by 'sea water.' The stipulations, however, are in fact against damage by 'sweat' and damage by 'perils (dangers and accidents) of the seas.'

"This court recently considered the question of burden of proof in the case of the *Patria*, where the exceptions were 'perils of the seas' and 'decay of any kind'; and expressed itself as follows:

" 'It is, no doubt, the rule, as appellant contends, that when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause. To illustrate, if the exception is 'damage caused by peril of the sea' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but, if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the sole damage to the cargo in the case at bar were manifestly decay, and the language of the exception were, as the respondent states in his brief, 'for decay caused by inherent defect,' the ship would have the burden of showing that

the decay was caused by inherent defect. If, however, the sole damage was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damages occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed.' The *Patria,* 132 Fed Rep., 971, 972.

"One member of the court as at present constituted is of the opinion that where the damage is caused by sea water the statement of the rule as given in the above excerpt is too broad; that under the English authorities *Hamilton* v. *Pandorff,* 16 Q. B. D., 633; 12 App. Cas., 523 and subsequent cases, the ship owner is relieved when he shows that the damage is caused by sea-water and there is no evidence that any fault, negligence or unseaworthiness of the ship allowed it to enter; and that the American Cases, *Cooper* v. *Rathbone,* Taney, 519; *The G. R. Booth,* 171 U. S., 450 are in accord with this construction. Therefore, although not satisfied by the proofs that the damage was caused by sweat he votes to affirm.

"The other two judges adhere to the rule laid down in the *Patria,* but one of them is satisfied that the weight of evidence is to the effect that the damage was not caused by sea water, but by sweat. Therefore, he votes to affirm. The other judge is not persuaded by the evidence to a finding that the damage was caused by sweat, and, believes that sea water was the cause. He does not think that, under the decision of the *Patria* case, the shipowner need show just how the water got in, but that he must show sufficient stress of weather to warrant the inference that it came in because of the action of external causes. And there being no evidence of such stress of weather

he votes to reverse. The result is that the decree is affirmed with costs."

After the filing of this opinion, the libelant filed a written application for a re-argument, or, in the alternative, for the certification to this court of certain questions of law. In deciding that application the Circuit Court of Appeals filed the following memorandum:

"On Monday, April 29th, at the opening of court, counsel may be heard briefly in re-argument upon a single point. That is whether, upon the finding of a majority of the court that sea water caused the damage, a statement of facts can be prepared which both sides will approve and upon which there may be certified to the Supreme Court the question whether the rule stated by this court in the case of *The Patria*, 132 F. R., 971, as to burden of proof should be applied in the disposition of the cause." *Record*, p. 613.

The parties being unable to agree upon the form of a certificate, the court prepared the certificate and questions which are now on file.

There was no question of seaworthiness involved in *The Patria*, above referred to. 125 F. R., 425; affirmed, 132 F. R., 971. The claim was for damage to a consignment of "giant beans" which had been damaged on a voyage from Marseilles to New York. Some of the beans on delivery "were shriveled, soft and spoiled,—might fairly be said to be decaying,—but these bags also contained the black substance which the witnesses for the libelant, including the chemist, unite in describing as coal dust." The ship de

fended under an exception of "decay." The actual ruling was that as the entire damage was not "decay," the libelant should recover. The seaworthiness of the ship appears to have been assumed in both courts. In the course of the opinion of the Court of Appeals, Lacombe, J., in dealing with the burden of proof, under the exception of decay, used the illustration, quoted at p. 13, which one of the judges who heard this case apparently considered to have been incorrect.

It is apparent, therefore, from the course of the proceedings, that the purpose of the certificate is to inquire whether the dictum contained in *The Patria,* or the statement of the rule of law found in the English cases, thus referred to, is correct.

As the existence of a condition of seaworthiness was assumed in *The Patria,* and lies at the basis of the definition contained in the English cases, it must be presumed, for the purposes of this discussion, that the questions certified are predicated on the necessary assumption that the *Folmina* was a seaworthy ship.

Moreover as two of the judges who signed the certificate had previously voted to affirm the decree on the ground that the loss was excepted by the bill of lading—one of them being of opinion that it was within the exception of "sweat," and the other that it was within the exception of "dangers and accidents of the seas and of navigation" —the majority at least must have found that the ship was seaworthy and without fault. If they

had not so found they could not have voted to affirm. As there was no reargument on the merits of the case, it cannot be assumed that the majority meant, by the terms of the certificate, to retract their finding on these points.

Unless the Court of Appeals found that the *Folmina* was seaworthy, the question whether she is relieved from responsibility for the loss by the exceptions in the bill of lading could not have arisen. The right to claim the benefit of exceptions is predicated on the seaworthiness of the ship. *The Caledonia,* 157 U. S., 124, 137, *The Carib Prince,* 170 U. S., 661, 662. If she was unseaworthy, the Court of Appeals would have been bound to hold her liable for the loss, and she could not have claimed the benefit of the exceptions. The fact that the Court of Appeals has certified to this court questions as to the character of the loss and whether it is within the exceptions, carries with it a necessary assumption that the question relates to a seaworthy ship. The ship being found to be seaworthy, her responsibility would depend on the answer that should be given to the question whether the loss was of the excepted class. But unless she was found to be seaworthy no such question could have arisen. The fact, therefore, that the Court below considered the question whether the loss was within the exceptions, and at first decided it in the shipowner's favor, and subsequently certified it to this court, conclusively shows that the condition of seaworthiness, on which alone the carrier can claim the

benefit of the exceptions, was found by the court below to exist.

Unless the questions certified are predicated on the conclusion that loss occurred on a seaworthy ship, and without the ship's fault, the certificate would not conform to the requirements of the statute. In *United States* v. *Union Pacific Railway Co.*, 168 U. S., 505, 512, the court stated that a question certified must "be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case."

It would be a most violent presumption to suppose that the Court of Appeals could have intended to leave the seaworthiness of the ship to be determined by this court on inferences from the very meagre statement of facts found in the certificate. The appellants ask the Court to indulge in inferences on this subject, *Brief*, p. 31, but we do not understand that the practice would sanction it; and, if the ship is not to be regarded as found to be seaworthy, for the purposes of this hearing, the claimant would wish to renew his application, which is on file, for a writ of *certiorari*, so that the question of seaworthiness could be decided on the entire record.

SECOND POINT.

THE DAMAGE TO CARGO FOUND TO HAVE BEEN CAUSED BY THE ENTRANCE OF SEA WATER INTO A SEAWORTHY SHIP, WITHOUT THE SHIP'S FAULT, IS "A LOSS BY A DANGER OR ACCIDENT OF THE SEA OR OF NAVIGATION," WITHIN THE MEANING OF THE EXCEPTION, EVEN THOUGH IT CANNOT BE DETERMINED, UNDER THE SPECIAL CIRCUMSTANCES, JUST HOW THE WATER GOT IN.

It should be noted at the outset that the exception in the bill is not "of sea perils" as stated in the first question, but is of "*dangers and accidents of the seas and of navigation.*" The latter exception is much broader in form, and apparently is broader in scope than the former.

A "peril" is "a danger; risk; hazard; exposure of person or property to injury, loss or destruction." An "accident," on the other hand, is an *event.* It is "anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a fortuitous event or circumstance."—*Century Dictionary.*

An accident, so far as concerns the shipowner, may be purely fortuitous, or it may result from the faults of his servants. If he is not personally at fault, the fact that water enters the ship and damages the goods is clearly an accident as to him and as to the goods. If the entrance of the water had been contributed to by some fault of the crew that circumstance might have involved the owner in liability for it; but it would not have made it any the less an accident so far as the owner is concerned. But the crew were not in

fault, so that questions which might have arisen if they had been to blame need not be considered. The fact that the water accidentally entered the ship from the sea during the voyage, would mean in the ordinary use of language, unless some legal rule to the contrary exists, that it was an "accident of the seas or of navigation." As was said by Mr. Justice Walton, in *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Company* [1902] 1 K. B. 290, 295: "If by some accident the ship is not kept tight, and the water comes in and damages the cargo, that is damage by an accident or peril of the seas."

The argument of the appellants is based on the theory that the exception of "dangers and accidents of the seas and of navigation" is of no broader import than the exception "perils of the seas," and that damage to cargo by sea-water cannot be brought under the exception of "dangers and accidents of the seas," unless the carrier is able to show, and does show the exact nature or cause of the injury which let the water into the ship, as distinguished from the cause of the damage to the cargo, and that the cause of the inflow of water was extraordinary, violent and external to the vessel.

In support of this contention the appellants rely on a *dictum* of Mr. Justice Story, in *The Reeside*, 2 Sumner, 567; but it is not authority for their proposition. The entire passage of his opinion, of which a part is quoted in appellants' brief is as follows:

"The phrase 'danger of the seas,' whether un-

derstood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence."

The exception in that case was, "of danger of the seas," which is obviously not so broad as "dangers *or accidents* of the seas *and of navigation.*"

Moreover, the learned justice was not dealing with a case in which sea-water had entered a seaworthy ship without the ship's fault, and caused damage to the cargo. He was considering a case where bales of carpeting had been damaged by the leakage from a consignment of 200 barrels of oil which had been stowed in the same compartment with the carpeting. It was claimed that the barrels had been properly stowed and that the leakage had been caused by the rolling of the vessel in heavy weather; but the Court found, "that the whole damage was occasioned by the uncommon leakage from the casks *arising from their bad condition when shipped,*" and that, "there is no evidence in the present case which satisfies my mind that if the oil had been *properly coopered* and properly stored the rolling of the vessel in the manner stated would have produced any such damage as occurred in this case."

The decision, in effect, was that the damage was

due to *want of care in stowing improperly coopered casks of oil in dangerous proximity to the carpeting,* and the language of the learned justice with regard to the scope and effect of the exception of dangers of the seas had special reference to the case then before him. Such a loss as he was dealing with was in no sense extraordinary.

The learned justice was not considering so much the nature or character of a loss by peril of the sea, as the question whether under all the circumstances the carrier in that case had used that degree of care to avoid the damage which would entitle him to exoneration under the exception of "dangers of the seas."

A case more nearly resembling that of the *Folmina* in principle is *Montoya et al.* v. *London Assurance Co.,* 1851, 6 Exch., 451; 86 R. R., 364. That was an action on a policy of insurance on tobacco, for damage claimed to have been caused by perils of the seas. The tobacco had been stowed on top of hides, and the ship having leaked, the hides became soaked with sea water. The tobacco was spoiled by fumes from the rotting hides. It was held that the damage to the hides was caused by a sea peril and that the damage to the tobacco was also attributable to the same cause. Platt, Baron, said at page 460:

"It appears to me, therefore, whatever mischief is occasioned to the cargo by the shipping of sea water, is a loss occasioned by the perils of the seas, and that the insurers are liable to make the loss good."

Even if the *dictum* of Mr. Justice Story in *The Reeside* be regarded as a correct statement of the law, it would not exclude the treatment of such a loss as occurred in this case as a "danger of the seas." He states that the phrase "danger of the seas" must be held to include only such "losses as are of an extraordinary nature, or arise from some irresistible force," &c. But the expression "losses of an extraordinary nature" means no more than that a damage to cargo by sea water cannot, as between shipper and carrier, be treated as a danger of the seas, if it is shown to have arisen from *ordinary wear and tear,* negligence or unseaworthiness. *Arnold Mar. Ins.*, 7th Ed., pp. 918, 919, 920. A damage to cargo by sea water, occurring in a seaworthy ship, without the fault of the officers or crew, and not arising from ordinary wear and tear, is "of an extraordinary nature" and within the exception. *Hamilton* v. *Pandorff*, 16 Q. B. D., 633, 635; 12 App. Cas., 523; *Davidson* v. *Bernand,* L. R., 4 C. P., 117, 122.

If, as the appellants seem to contend, the statement of Mr. Justice Story meant that only sea water losses which are occasioned by extraordinary violence of the winds or waves can be treated as "dangers of the seas," the effect of it would be to say that the exception of "dangers of the seas" is practically synonymous with that of the "Act of God." The statement, so limited, would be inaccurate. It has been held in a number of cases that the exception "dangers and acci-

dents of the seas and of navigation" is a much broader exception, and covers many contingencies which would not be covered by the phrase "Act of God."

In *Clark* v. *Barnwell,* 12 Howard, 272, spools of thread in the hold of a vessel were injured by humidity and dampness resulting from sweat. The bill of lading contained the exemptions "all and every the dangers and accidents of the seas and navigation of whatsoever nature and kind." Mr. Justice Nelson said at p. 282:

"Now the evidence showing very satisfactorily that the *damage to the goods was occasioned by the effect of the humidity and dampness,* which in the absence of any defect in the ship or navigation of same, or in the stowage, *is one of the dangers and accidents of the seas* for which the carrier is not liable, the burden lay upon the libelants to show that it might, notwithstanding, have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods. * * * "No doubt the unusual duration of the voyage on account of tempestuous weather and adverse winds, in connection with the fact that it was one in which the ship passed from a northern to a southern latitude and in a season of the year when a change from a cold to a warm climate must have been considerable, greatly increased the damage and also the influence of it on goods liable to damage from that cause. But the carrier is not responsible for delay on the voyage on account of boisterous weather or adverse winds, low tides or the like, as was held in the case of *Boyle* v. *M'Laughlin,* 4 Harr. & J., 291. These are *dangers and accidents of navigation* over which he has no control and against which his contract contains no warranty."

To the same effect, *The Viscount*, 11 Fed. Rep., 169.

Mr. Chief Justice Fuller, in *The Majestic*, 166 U. S., 375 at 386 said: "The words 'perils of the sea' may indeed have grown to have a broader signification than 'the act of God.' "

A careful examination of American cases as well as English cases indicates that the decisions have gone far beyond holding that it is necessary that there should be a severe storm or other extraordinary accident to constitute "a danger or accident of the seas." A leak caused by rats, in spite of due precaution to prevent their presence on board, is a peril of the sea. *Garrigues* v. *Cox*, Pa., 1 Bin., 592, 598; 2 American Decisions, 493. A sudden leak by which a vessel seaworthy at the inception of the voyage foundered without any extraordinary stress of weather or other apparent cause, was held to be a peril of the sea. *Patrick* v. *Hallett*, 1 Johns., 241.

In *Starbuck* v. *The Phœnix Insurance Co.*, 62 N. Y. Supp., 264, water came into a vessel through an open port shortly after she sailed, and she sank without having encountered any storms. The Appellate Division approved a charge of the trial court, which said:

"If the dead light, although sufficiently secured, became open through accident and the loss arose from a cause not reasonably to be anticipated or guarded against by the owners, it is for you to say whether this is not damage done by a peril of the seas within the definition which I have stated."

A judgment for the plaintiff was affirmed in the Appellate Division, 47 App. Div., 621, and on further appeal it was affirmed without opinion by the Court of Appeals, 166 N. Y., 593.

In *Potter* v. *The Insurance Co.*, 2 Sumner, 197, Mr. Justice Story held that a damage by grounding by the ebbing of the tide was a loss by perils of the sea.

It is sometimes said that by the phrase "sea perils" is meant extraordinary action of the sea, but there are few cases in which *extraordinary* is defined in this sense.

In *Bullard* v. *The Roger Williams Insurance Co.*, 1 Curtis 148, an action was brought on a policy of marine insurance on the brig *Star* at and from Fall River to Havana and thence to a northern port in the United States. The vessel proceeded to Havana, took on board a cargo of molasses and sailed on her return voyage. Soon after leaving Havana she met the cross sea, which is ordinarily thrown up in the Florida Straits by the meeting of the trade wind and the Gulf Stream. She sprung a leak, which increased, and she was obliged to put in to Key West. It was found that it would cost more to repair her than she was worth, and surveyors recommended a sale. The plaintiffs sued as for a total loss. In his charge to the jury, Mr. Justice Curtis said:

"It has been stated by the defendants' counsel, that the law requires all vessels to be so strong as to resist the ordinary action of the sea, in the voyages for which they are insured. This is true. It is also said, and you will judge whether it is sat-

isfactorily shown, that a cross sea is ordinarily to be expected to be met with, in the Florida gulf stream, and that if this vessel broke down in such a sea, this is conclusive proof that she was not seaworthy for this particular voyage. But *I do not understand that the law requires vessels to be so strong as not to receive injury from any state of the winds and sea which may ordinarily be expected in the voyage for which she is insured.* This is not what is meant by the ordinary action of the winds and sea. In some sense, gales and heavy seas may be said to be ordinary. They are of very frequent occurrence in some parts of the world. A vessel going round Cape Horn, in the winter, scarcely fails to encounter them. But if damage is suffered by their action on the vessel, or cargo, it would certainly be no defence for the underwriter to say, that in that voyage they almost always occur, and the vessel should have been strong enough to resist them. Gales of wind and heavy cross seas are not the ordinary action of the sea, in the sense of the law of insurance, and *when injury is suffered by a seaworthy vessel from their action on her, she is damaged by a peril within the policy.* At the same time, if seaworthy vessels usually, and, so far as appears, always, go through such seas as are described by these witnesses to have existed on this passage, without sustaining material injury, it certainly tends to show that the injuries suffered by this vessel are to be ascribed, not to a peril of the sea, but to the insufficiency of this vessel. It is a matter of fact for your good sense to determine. The law raises no presumption concerning it, and, I apprehend, cannot safely do so. Because, when the winds and seas are not in their ordinary state, it is impossible to say, beforehand, what effects they will produce upon seaworthy vessels. One may get *an unlucky twist*, as seamen call it, and

be broken down, while another, under circumstances apparently no more favorable, receives no injury. And, therefore, there is no legal presumption to guide you; but you must consider and weigh the probabilities of the case."

Cf. Patrick v. *Hallett*, 1 Johns., 241, 246, 247.

In *Hooper* v. *Rathbone*, Taney, 519, the ship *A Cheeseborough* had loaded a cargo of wheat in bulk for Liverpool at Baltimore. The vessel was seaworthy and the stowage was proper. During the voyage rough, but not extraordinary weather was encountered. The pumps of the vessel became clogged with wheat. The ship put into St. Thomas for refuge.

A survey found that the wheat in places was musty and that in the wings it was wet with sea water, though the damage did not extend far into the bulk of the cargo. The discharge of the cargo was recommended.

It was found that part of the wheat had been lost by pumping, and that part of it was damaged by sea water and was so musty that it was deemed best for the interest of all concerned to have it sold at St. Thomas. The libel was filed to recover the value of the wheat which the vessel failed to deliver by reason of these facts. The bill of lading contained an exception of perils of the sea. The District Court found in favor of the libelants, but on appeal to the Circuit Court the decree was reversed and the libel dismissed by Chief Justice Taney. After describing the voyage and the disposition of the cargo in substantially the manner just given the Chief Justice said:

"It is true, that the storm was not violent enough to dismast her or to carry away her sails; but the evidence shows that it blew heavily, that the sea was rough, and that the vessel was rolling and pitching in it, before any inconvenience was experienced from the wheat in the pumps.

"There is not the slightest evidence that the ship was strained by carrying too much sail in heavy weather; and the proof is positive and uncontradicted, that the bin was constructed by one of the most experienced shipjoiners in Baltimore. and was examined by him and the master of the vessel before the wheat was put in, and found to be without fault; and their judgment is confirmed upon the survey made at St. Thomas after the wheat was unladen, and the construction of the bin examined by the surveyors and the proof is equally positive and uncontradicted, in relation to the sufficiency, and indeed, the excellency of her pumps.

"Now trying this case upon the testimony before the court, the conclusion is inevitable, that the loss was occasioned by the perils of the sea; for the ship is proved to have been among the strongest ever built in Baltimore; and *if the bin was properly constructed, the pumps properly arranged, the vessel seaworthy, and there was no negligence or misconduct of the master in navigating her, there is nothing but the perils of the sea to which the disaster can be imputed.*

"No doubt a vessel laden with wheat in bulk is more liable to sea-damage than with some other cargo; and she may be disabled from proceeding on her voyage by encountering winds and waves, through which a different cargo might pass without injury to the vessel or cargo. But it is not suggested that vessels of a different description from this, or differently fitted out, or differently

laden, are required to transport wheat in bulk. *And if there was no fault in the ship, or in her equipments, or in the stowing of the cargo, or in the manner in which she was navigated; and if every precaution was taken, which is usual and customary in transporting such a cargo, I see no ground upon which the ship-owners can be charged with the loss.*"

Though this decision was not before Judge Thomas his opinion was based on almost identical grounds. *Ante*, pp. 8-11; 143 Fed Rep., at p. 637.

The district judge rightly held, in this case, that damage to the rice by sea water entering a seaworthy ship without the fault of the ship or her crew was within the broad language of this exception.

The meaning of the words "a loss by a danger or accident of the seas or of navigation," or "by a peril of the sea," is the same in a bill of lading as in a policy of insurance on goods. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, while negligence contributing to the loss would not be a defense to an underwriter, but this result does not flow from any different meaning of the same words occurring in two maritime instruments. *The G. R. Booth*, 171 U. S., 450, 459.

In the present case the loss would be "an accident of the seas or of navigation," whether the words appear in a policy or in a bill of lading.

These propositions appear to be established by the cases of *Hibernia Insurance Co.* v. *St. Louis*

Transportation Co., 120 U. S., 166, and the *G. R. Booth, supra.* They are also supported by *The Xantho,* 12 App. Cas., 503; *Hamilton* v. *Pandorff,* 16 Q. B. D., 633; 12 App. Cas., 518; *Blackburn* v. *Liverpool, Brazil & River Plate St. Nav. Co.* [1902], 1 K. B., 290: *The Southgate* [1893], Prob., 329; *The Cressington* [1891], Prob., 152; *The Glendarroch* [1894], Prob., 226; *The Exe,* 57 Fed. Rep., 886; *The Castleventry,* 69 Fed., 475 *note; Davidson* v. *Bernand,* L. R., 4 C. P., 117, 122.

In *The Xantho, supra,* the question was whether the owners of the steamer's cargo could recover from the shipowners their damages sustained by the sinking of the vessel in a collision. The bill of lading contained an exception of "*dangers and accidents of the sea.*"

The course of the case to the House of Lords was peculiar. The plaintiffs proved shipment, and the loss of their cargo by reason of the collision, but adduced no evidence of fault on the part of the *Xantho.* The defendants then proved the exception of "dangers and accidents of the seas" contained in the bill of lading and rested. They offered no evidence to show that the *Xantho* was free from fault, or that the other vessel was exclusively in fault, because *Woodley* v. *Michell,* 11 Q. B. D., 47, had decided that damage to cargo caused by a collision due to another vessel's fault was not a peril of the sea, and that decision was binding on the Court of Admiralty. On this state of the proofs, the Admiralty Divis-

ion held the loss was not "a danger and accident of the sea," and this decision was affirmed in the Court of Appeal.

The question before the House of Lords was virtually two-fold, (1), whether *Woodley* v. *Michell* was rightly decided; and (2), whether the Court could determine that the loss was "a sea peril loss," *without knowing which ship was in fault for the collision. The record did not present the further question whether the owners of the Xantho were relieved from liability by the exception,* and therefore the House of Lords refrained from expressing any opinion on that point. *It dealt exclusively with the character of the loss,* and whether or not it was within the language of the exception.

The Court overruled *Woodley* v. *Michell,* and held that damage caused by the inflow of sea water through a hole made in the ship's side by collision was "a danger and accident of the sea" within the exception; but left open the question whether the shipowners were entitled or disentitled to the benefit of the exception.

Lord Herschell, at p. 508, said:

"The question, what comes within the term *perils of the sea* (and certainly the words *dangers and accidents of the sea* cannot have a *narrower* interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

"I think it clear that the term *perils of the sea* does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. * * *

"It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that, if a vessel strikes a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler*, 5 M. & S., 461, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

"But it is said that the words, *perils of the sea*, occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, whilst in the former you may go behind the *causa proxima* and look at what was the real or efficient cause. * * * Now I quite agree that in the case of a marine

policy, the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. *But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception.* It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments."

Lord Bramwell, at p. 513, said:

"Was it by a peril of the sea that the defendants' ship foundered? The facts are that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does.

"It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments? Why should

they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case, and not in the other?

"The argument is that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without light. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say, 'I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea.'

"The Court of Appeals, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, 'Oh, the loss is not by perils of the seas, but by bad carpentering.' Let there be no doubt. I do not say that in such case the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas."

In *Hamilton* v. *Pandorff*, *supra*, the question

was whether damage to rice by sea water, which entered the ship through a hole gnawed in a lead pipe by rats was "*a danger or accident of the sea*," within an exception in the bill of lading. The Court held it was, and on a finding of the absence of negligence absolved the shipowners from liability.

Lopes, *J.*, in the Queen's Bench Division, held that the damage was within the exception of dangers and accidents of the seas, and that the shipowner was not responsible. In the course of the opinion, 16 Q. B. D., p. 633, he said:

"In a seaworthy ship, damage to goods, caused by the action of the seas during transit, not attributable to the fault of anybody, is, in my opinion, 'a danger or accident of the sea' intended to come within the exception and exonerate the shipowner. It is clear that the action of the sea itself is one of the causes contemplated."

At p. 635, he said:

"I think a loss arising from some inevitable accident at sea whereby sea water enters the ship and damages goods is 'a danger or accident of the seas' within the exception. It seems to me, that where the effective cause is beyond human control, and in consequence salt water enters which damages goods it is 'an accident of the sea' within the meaning of the contract of affreightment and the true intention of the parties. Here, it is the sea damage occurring at sea and nobody's fault. I think the defendants have brought themselves within the exception."

This judgment was reversed by the Court of

Appeals, 17 Q. B. D., 670, but it was afterwards re-instated by the House of Lords.

Lord Halsbury, L. C., at pp. 522, 523, 524, said:

"My Lords, in this case the admissions made at the trial reduce the question to this: Whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. *That this happened without any negligence of the shipowner is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts as I have stated them constituted a danger or accident of the sea.* * * *

"Some effect must be given to the words *perils of the sea.* A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni* v. *Drury*, 8 Ex. 166; 22 L. J. (Ex.) 2. In the Law Journal report of that case Pollock, C. B., and Alderson, B., distinctly pointed out, after the judgment of the Court had been given, that the decision at which the Court had arrived did not touch the question of whether the sea let in by a hole made by a rat was an accident or danger of the sea. *One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel [from the sea]* upon which the vessel was to sail in accomplishing her voyage.* It would not necessarily be by a storm; the parties have not so limited the language of the contract. It might be by striking on a rock, or by excessive heat so as to open some of the upper timbers. These and many more con-

tingencies that might be suggested would let the sea in, but *what the parties, I think, contemplated was that* [*if*]* *any accident not wear and tear, or natural decay should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract.*

"A subtle analysis of all the events which led up to, and in that sense *caused* a thing, may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation, which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

"In the class of contract *where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them*, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to

*The words in brackets though omitted, apparently by error, from the official report, appear in the report contained in 5 Aspinall, N. S., 212, 213.

the words *dangers and accidents* of the seas

* * *

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case *it was a danger, accident or peril, in the contemplation of both parties, that the sea might get in and spoil the rice.* I cannot think it was less such a peril or accident, because the hole through which the sea came was made by vermin from within the vessel, and not by a sword fish from without—the sea water did get in."

Lord Watson at p. 525, said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of the mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea,' different from

that which it bears in a contract insuring cargo against sea risks; that in a case of a charter-party or bill of lading, the Court ought to look to what has been termed the remote, as distinguished from the proximate cause of damage; whereas, in the case of a policy the proximate cause can alone be regarded. *The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of the contract to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner, or of those for whom he is responsible.* * * * I am of opinion that the appellants must prevail, *because it has not been shown that the peril, which was the immediate and efficient cause of damage, owed its existence to their negligence.*"

In the *Southgate* 1893, Prob. 329, the entrance of water during the loading of cargo, through an overboard delivery valve, connected with the circulating pump, which the engineer properly opened, but neglected to close, was held to be a loss by "*a danger and accident of the seas or other waters,*" as well as "*an accident of navigation,*" within the meaning of an exception in a bill of lading.

In the *Cressington* 1891, Prob. 152, the exception in the bill of lading was of: "Perils of the sea * * * and other *accidents of navigation,* even when occasioned by the negligence * * * of the * * * master." During the voyage a rivet in the foot of a bulkwark stanchion worked

loose, and through the leak thereby occasioned the cargo was damaged by sea water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea water. Owing to the dunnage of the waterways in the 'tween-decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the lower hold was still further damaged. It was *held* that the shipowner relieved from liability by the exceptions.

Sir James Hannen, President (at p. 160), said:

"The first question is whether the *prima facie* liability of the shipowner for the damage which arose to the cargo is removed by the exception contained in the clause. The learned judge in the Court below appears to have thought that the original source of damage was not attributed to the shipowner, but that he was liable to this extent, that when the damage was discovered to have arisen, the master did not make use of such means as were in his power to prevent the continuance of the leakage, and that that was not within the exception. We are of opinion that that is not so. *The mischief arose from the inflow of water in the course of navigation, and that, in our judgment, is a peril of the sea and an accident of navigation.* The clause, however, goes on to say, 'perils of the sea and accidents of navigation, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners.' It appears to us from these words in the clause that the alleged negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against."

A similar ruling was made by the Circuit Court of Appeal of the Second Circuit, in *The Exe*, 57 Fed. Rep., 886.

In the *Glendarroch* [1894 Prob.], 226, the plaintiff s brought an action against the owners of the *Glendarroch* for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water, through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea.

The President, Sir F. H. Juene, ruled that in order to excuse themselves from the damage to the goods, it lay on the defendants to show not only a peril of the sea, but *a peril of the sea not occasioned by their negligence.* It was held by the Court of Appeal (Lord Esher M. R., Lopes and Davey, L. JJ.) reversing the decision, that the loss fell within the exception, and that the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs. Such is the rule in this Court. *Cau* v. *Texas & Pacific Railway Co.*, 194 U. S., 427.

The most recent and instructive case on the subject is *Blackburn* v. *Liverpool, Brazil & River Plate Steam Navigation Co.*, 1902, 1 K. B., 290. The steamship *Tropic* brought a cargo of sugar to the port of New York. When the vessel was outside Sandy Hook the chief engineer opened the sea

cock to admit sea water into a ballast tank. By a mistake, which the Court said was probably an act of negligence, the engineer opened another valve by which the sea water was let into one of the holds The ship was then no longer tight, although, as the Court said, when the sea cock only had been opened, the cargo spaces of the vessel still remained perfectly tight. The bill of lading contained an exception of "*perils of the sea or of navigation,*" even though caused by the negligence of the vessel's officers. The Court found that the entrance of sea water into the hold in this manner was a peril of the sea, and that as the exemption from the act of negligence which occasioned the peril was valid and binding, the ship was relieved from liability for the loss by the exception.

Mr. Justice Walton, in dealing with the nature of the damage, said at p. 293:

"The plaintiffs in this action seek to recover that amount, and say that they are entitled to recover that sum as damages, because the shipowners were bound by their contract to carry and deliver the cargo safely and failed to do so. The defendants, on the other hand, contend that the obligation to carry and deliver the cargo safely is subject to the exceptions contained in the bill of lading, among which there is an exception in respect of 'loss or damage resulting from any of the following perils (whether arising from the negligence, default, or error in judgment of the * * * engineers * * * or otherwise howsoever), * * * or other peril of the seas, rivers, or navigation of whatever nature or kind soever.' The shipowners say that they are exempt because the case comes within that exception.

"Numerous cases have been cited, but I think that the law upon this question has really been cleared up and established by the three cases in the House of Lords: *Thames and Mersey Marine Insurance Co.* v. *Hamilton*, 12 App. Cas., 484; *The Xantho*, 12 App. Cas., 503; and *Hamilton* v. *Pandorf*, 12 App. Cas., 518, of which I think that *Hamilton* v. *Pandorf*, 12 App. Cas., 518, is the example most applicable to the present case.

"It is to be noticed that in those three cases no question arose with regard to a negligence clause, for in those cases the shipowner was not exempt from liability for damage arising from negligence of the crew.

"As I understand the law, where there is not a negligence clause, the shipowner is bound absolutely to deliver the goods safely, subject to the exception of perils of the seas and any other exceptions contained in the bill of lading. If he fails to carry the goods safely, but the loss is occasioned by one of the excepted perils, then *prima facie* he is not liable. In the cases before *Hamilton* v. *Pandorf*, 12 App. Cas., 518, the contract of the shipowner was not only to carry the goods safely, subject to the excepted perils, but, further, to use all due care and diligence to deliver safely, and, therefore, the exceptions relieved him from his absolute obligation, but not from the obligation to use due care and diligence, if there was no diligence clause. If the shipowner failed to use due care and diligence, though he was exempt by the exception from his absolute obligation, yet he was not exempt from liability for breach of his contract to use due care and diligence, if there was no negligence clause; and, therefore, if a loss was occasioned by want of due care and diligence, the shipowner was liable even if the loss was occasioned by an excepted peril.

"In the present case there is what is called a negligence clause, and the shipowner is exempt from liability for loss occasioned by peril of the seas though caused by negligence, and, therefore, we have not to consider the liability for want of due care and diligence.

"The only question is whether the loss was occasioned by a 'peril of the seas or navigation.' If it was, then the shipowner is protected by the exception, although the loss was caused by the negligence of his servant. Therefore, we have not really to consider what is a fault or error of navigation, but only whether the loss was occasioned by a peril of the seas or navigation. Now, it is perfectly true, as was pointed out by counsel for the plaintiffs, that, to bring the case within the exception, there must in the first place be an accident, by which I understand that the loss must be something which *might*, and not necessarily *must*, follow. That was pointed out by Lord Halsbury, L. C., in *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 524, where he said: 'I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through seas. 'Therefore, things which must necessarily happen cannot be perils of the seas. Then, it must be not only an accident, but an accident of the seas, as was pointed out by Lord Herschell in the *Xantho*, 12 App. Cas., 503, 509.

"It seems to me, however, to be a fallacy to say that because the loss was caused by mistake or neglect on the part of a servant it was therefore not an accident. The loss was obviously a thing which *might*, but not necessarily *must*, hap-

pen. In the ordinary and proper sense, a damage arising from the negligence of a servant is an accident or casualty. It seems to me, then, that this loss did arise from an accident. Was it an accident of the seas? As I understand the judgments of the learned Lords in *Hamilton* v. *Pandorf*, 12 App. Cas., 518, and *The Xantho*, 12 App. Cas., 503, one of the perils of the seas is that, if the ship is not kept tight, the sea-water will come in. *If by some accident the ship is not kept tight and the water comes in and damages the cargo, that is damage by an accident or peril of the seas.*

"In my opinion, these considerations afford a simple answer to the question in this case. The engineer intentionally opened the sea-cock, but the vessel still remained perfectly tight. The sea-water could not come into the carrying part of the vessel, nor sink the vessel; it was the same as if the water had been let into the ballast tank, in which case the ship would have remained perfectly tight. That being the position of things, the engineer, entirely by a mistake which was probably an act of negligence, opened a valve by which the sea-water was let into the carrying part of the ship, and then the ship was no longer tight. The sea-water then damaged the cargo which was in the carrying part of the ship. I cannot distinguish this case from the case in which a port was accidently left open by negligence and the sea-water was thereby let into the ship: *Carmichael* v. *Liverpool, &c., Indemnity Association*, 19 Q. B. D., 242. In either case an opening was made accidently by mistake, and the ship then ceased to be tight. *It seems to me that in either case the ship by negligence, by an accident, was exposed to the peril that, if the ship was not kept tight, the sea-water would come in and that is essentially a peril of the seas*, and a peril to which

every ship is exposed while she is afloat. The damage or loss occasioned by that peril is within the exception in the bill of lading, and the shipowner is exempt from liability. My judgment must, therefore, be for the defendants."

In *Thames & Mersey Marine Ins.* v. *Hamilton*, 12 App. Cas., 492, Lord Bramwell suggested the following definition of a sea peril under a policy of insurance: "Every incidental circumstance not the result of ordinary wear and tear, decay, or of the act of the assured, happening in the course of the navigation of a ship, and incidental to the navigation, and causing loss to the subject matter of the insured."

In *Davidson* v. *Bernand*, L. R. 4, C. P. 117, water was let into a ship by the negligence of the crew in leaving open a cock or a valve in the machinery, Brett, *J.*, in defining the character of the loss, said at p. 122:

"By reason of some cock being left open in the discharge pipe the water got into the ship and so damaged the cargo. If that was so, the water got in not by the happening of any ordinary occurrence in the ordinary course of a voyage, but by the accidental circumstance of some cock having been left open by the negligence of the crew. That is, in my opinion, sufficient to make the underwriter liable. The question is the same as it would have been if by the falling of a mast through the vessel, or other negligent act of the crew the vessel had sunk in deep water, and I think the loss sufficiently comes within the doctrine of one happening by a vis major, and is within the meaning of the policy a loss caused by the perils insured against."

In *The Ontario*, 37 Fed. Rep., 220, 225, Mr. Justice Brown, then District Judge, also approved the doctrine of the leading English cases. Referring to a passage in the case of the *Portsmouth*, 9 Wall., 682, he said:

"It will be observed here that the Court expressly repudiates a distinction formerly taken between bills of lading and policies of insurance, with regard to what shall be deemed a loss by a peril of the sea. This distinction has also been fully *exploded* by the House of Lords in England in the recent case of *Wilson* v. *Owners of The Xantho*, 6 Asp., 207, 12 App. Cas., 503; and *Hamilton* v. *Pandorff*, 6 Asp., 212, 12 App. Cas., 518, 525."

The conclusion to be drawn from the foregoing review of the authorities is that the question whether the incursion of sea water into a ship is a danger or accident of the sea is a question of fact. The authorities show that such inflow of sea water is considered within the definition of a danger or accident of the sea. Whether or not the shipowner will be protected against the consequences of such danger or accident is a question of law depending on the construction of the documents in connection with the circumstances of the case. Under settled legal principles the shipowner will be protected unless the danger or accident was shown to have been induced by his negligence. The certificate states that there was no negligence here.

The difference between the parties on this hearing is essentially one of definition.

The question which the court has certified, relates to the proximate cause of the damage. Was the damage by sea water which entered the ship under the circumstances stated, a loss resulting from a danger or accident of the sea or of navigation? It is unquestionable that the cause of the damage to the rice was sea water. The appellee maintains that such damage occurring during the voyage in a seaworthy ship, without the fault of the officers or crew, and not due to ordinary wear and tear, is "an *accident* of the seas, or of navigation." The appellants say that this argument confuses the condition of the cargo, with the cause of that condition. But as the condition of the cargo was a damaged condition, and the cause of the damage was sea water, the only remaining question to be determined is, whether the admission of the water into the ship was "an accident of the seas and of navigation."

The real claim of the appellants seems to be that though the accidental wetting of their cargo, by sea water, was the cause of their loss, yet the ship cannot be exonerated from such loss without showing the cause of that cause. Their argument on this branch of the case is, in effect, that which was rejected by Brown, *J.*, in *The Vaderland,* 18 F. R., 733. A consignment of telegraph wire had been damaged by rust, and the bill of lading contained an exception of "rust or corrosion." The shipper claimed that the cause of the rust was one for which the ship was not liable. The learned judge, at p. 740, said:

"The argument on the part of the importers, however, goes back of the fact of the oxidation or rusting of the wire, and insists that the burden of proof is upon the carriers to show what was the cause of that rusting, and that this cause was within the exceptions of the bill of lading, in order to clear them from liability. I cannot sustain this view of the case. It is enough for the carrier, in the first instance, to show that the damage itself was of the kind excepted in the bill of lading. The oxidation or rust, in this case, is of that character. It is not incumbent upon the carriers, therefore, in the first instance, to discover what it was that caused the rust, and then to show that that particular rust was through no fault of theirs."

In the cases of *The Giava*, 56 Fed. Rep. 243; *The Svend*, 1 Fed Rep. 54; *The Zone*, 2 Sprague, 19; *The Queen*, 78 Fed Rep. 155; 94 Fed. Rep. 180, and others of that class on which the appellants rely, the real question involved was not as to the nature or character of the loss, which, in each case, was damage by sea water, but whether the carrier had succeeded in satisfying the court that the inflow of the sea was not due, either to the unseaworthiness of the ship, or to some contributing fault on the part of his servants. We do not question the correctness of the doctrine enunciated in such cases, that where the damage arises from sea water, the carrier must satisfy the court that the ship was reasonably fit for the voyage, and that he has used due care to avoid damage to the cargo by sea water. The proper interpretation of all the cases of this class on which the appellants rely is, that the carrier

had not succeeded in satisfying the court that he had furnished a fit ship and had used due care to avoid the damage. None of those cases was primarily concerned with the question of the *character* of the damage, considered apart from the question of seaworthiness or of fault on the part of the carrier contributing to the damage.

The precise question here involved has not, so far as appears, been considered in any American case.

The appellants claim that the decision of the question certified should be controlled by the decision of this court in the *G. R. Booth*, 171 U. S., 450. It is true that the learned district judge who decided that case considered and determined it on the theory that the inflow of water without the ship's fault was, under the circumstances, a peril of the sea. 64 Fed. Rep., 878. But it appearing that the water which caused the damage came into the ship by reason of a defect in the side plating, caused by an explosion in the cargo, and without other intervening cause, this court held that "the case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was occasioned by the perils of the sea; or, in other words, whether it is the explosion or a peril of the sea that is to be considered as the proximate cause of the damage according to the familiar maxim, *causa proxima non remota spectatur*. 171 U. S., at pp. 452, 453. It was held that the explosion

was the proximate cause of the damage, and that as explosion was not a sea peril, nor an excepted peril, the steamship was liable for the loss. Beyond determining that the words "perils of the sea" have the same meaning in a bill of lading as in a policy of insurance, a ruling, which, as applied to the facts of this case, would, as we contend, mean that the loss was within the exception, *Davidson* v. *Bernand*, L. R., 4, C. P., 117, 122, the decision in the case of the *G. R. Booth* appears to have no bearing on this controversy.

The claim of the appellants that the steamer should not escape liability for the damage to the rice without proving, clearly and satisfactorily, the way in which the water entered the ship, is not based on any substantial ground.

The cause of the damage is expressly stated in the certificate to have been sea water. But as it does not appear how the water got in, the appellants contend that the case should be treated as one in which the carrier had not tried to offer any explanation of the damage. On this point the certificate is against them. It shows that not only the carrier's servants, but also competent surveyors, employed by the respective parties, endeavored by all possible means to ascertain and explain the manner in which the sea water might have entered the ship. The fact that they could not find any adequate explanation shows, as the District Judge found, *ante*, p. 9, that the ship did her full duty in trying to explain, but that the means by which the water entered could not be as-

certained or determined by the most diligent efforts. The certificate contains no suggestion that the carrier did not, in the utmost good faith, try to inform the libelants and the Court as to the cause of the damage and how it occurred.

No doubt it is the rule that where damage to cargo occurs and the carrier makes no effort to explain it, a presumption arises that it was due to his fault; but where, as the certificate shows, neither the officers nor competent surveyors, after a most careful examination could explain how the sea water which caused the damage could have entered the ship, nothing further in the way of explanation could reasonably be required. The inability of the officers and crew and of the surveyors to discover any defect by which the water might have entered the ship is proof that none existed; and if no defect existed in the vessel, and there was no negligence on the part of the crew, the entrance of sea water may fairly be claimed to be "a danger or accident of the sea, or of navigation," even though the precise manner in which the water entered cannot be stated.

In *The Mascotte,* 48 Fed. Rep., 119; 51 Fed. Rep., 605, on which the appellants rely, the vessel was held liable for a cargo loss which she could not explain, because the damage was caused by the staining and defacing of the packages, and there was no exception of losses of that kind in the bill of lading. The loss was not therefore, brought *prima facie* within any exception, and the carriers remained liable. The ground of liability was not the failure to explain the damage, but the

failure to show that it fell within an exception. In this case salt water damage to the rice is an accident of the sea or of navigation, and is, *prima facie*, within an exception, and as the shipper could not show that the loss was contributed to by negligence the ship should have the benefit of the exception.

It is not always necessary, in order to bring a loss within an exception of "dangers or accidents of the sea or of navigation," or within an insurance against "sea perils," to furnish a precise explanation of the manner in which the accident complained of has arisen. A familiar instance in which a carrier is relieved from an unexplained loss by sea perils, and an insurer is held liable for such a loss, is that of a seaworthy vessel which sails from her loading port, with a cargo, and disappears without ever being heard from. In such a case the insurer of the vessel or of the goods would be liable for the loss of the insured property by sea perils; and the same state of facts would afford a complete answer to an action against the carrier for the loss of the goods.

The true intent and purpose of the rule which ordinarily requires the carrier to give an explanation of damage to cargo, is to require him to furnish such information as he may possess, with regard to it, in order that the Court may be satisfied that the loss has not resulted from his negligence or from the unseaworthiness of the ship. Where, as in this case, it is found that a cargo damage has been caused by the entrance of sea

water into the ship, during the voyage, without the negligence of the ship's officers or crew, and that the ship was seaworthy for the voyage, a *prima facie* case of a loss by "a danger or accident of the seas or of navigation" is made out, and the reason of the rule is satisfied, even though in the special circumstances, neither the carrier nor the most expert of surveyors could determine how the water got in the ship. *See* opinion of Thomas, *J.*, *ante*, p. 11.

In the absence of any allegation of unseaworthiness by the shipper, or of any attempted proof of it, or of fault on the ship's part, the loss should be considered to be within the exception.

LAST POINT.

THE QUESTIONS CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

January 20, 1909.

Respectfully submitted,

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
CHARLES R. HICKOX,
Counsel for the *Folmina*.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 84.

GUSTAVE H. JAHN ET AL., LIBELLANTS,

vs.

STEAMSHIP FOLMINA, WILLIAM VAN EYKEN, CLAIMANT.

Libellants' Memorandum of Additional Authorities Opposing Carrier's Contentions.

1. The Folmina's brief takes no account of the fact that the protection of cargo interests against the evasion of liability by carriers is a part of the policy of this country.

a. Attempts to apply foreign law to negligence clauses:
Liverpool Steam. Co. v. Phenix Ins. Co., 129 U. S., 397, 447.

b. Cargo owner's risk clause:
Compania la Flecha v. Brauer, 168 U. S., 104, 123.

c. Limit of liability:
The Majestic, 166 U. S., 375, 386.
Calderon v. Atlas S. S. Co., 170 U. S., 272, 282.
The Kensington, 183 U. S., 263, 274.

d. Latent defect clauses:
The Carib Prince, 170 U. S., 655.

e. Carrier's exoneration ineffective where liability asserted through a third party:
Erie R. R. Co. v. Erie Transp. Co., 204 U. S., 220, 226.
The Chattahoochee, 173 U. S., 540, 549.

f. Doubtful cases under the Harter act:
The Delaware, 161 U. S., 459, 470.
The Irrawaddy, 171 U. S., 187.
Int. Nav. Co. v. Farr & Bailey, 181 U. S., 218.
Knott v. Botany Mills, 179 U. S., 69.
The Germanic, 196 U. S., 589.

2. Folmina's Brief, page 5. If it were to be assumed that the Circuit Court of Appeals intended to make a finding of actual seaworthiness, actual freedom from fault, etc., it would follow that sea water could not have entered. Yet it did enter. Only one out of the four judges below has adopted the sweat theory of damage. That theory is eliminated from consideration here.

3. Folmina's Brief, pp. 8-11, 52. The attempt to discredit the findings of the Circuit Court of Appeals by invoking those of the district judge is incomprehensible. It seems improper for us to point out to this court the numerous circumstances in the record that seem wholly inconsistent with the favorable opinion of the probative value of the testimony of the ship's officers, which the district judge apparently entertained.

4. Folmina's Brief, p. 14. *Hamilton v. Pandorf* and other English cases do not relieve the carrier upon a showing of sea-water damage to cargo where there is *no evidence* of fault or unseaworthiness; but where the evidence does show care and seaworthiness and satisfactorily explains how the sea water entered.

Moreover, in England a wholly different policy is pursued from our own in dealing with relations between carrier and cargo.

(*a*) *Liverpool Steam Co. v. Phœnix Ins. Co.,* 129 U. S., 397.

The Cressington [1891], Prob., 152, 160.

(*b*) *The Irrawaddy,* 171 U. S., 187.

Erie R. R. v. Erie Transp. Co., 204 U. S., 220, 226.

Milburn v. Jamaica Trading Co. [1900], 2 Q. B., 540.

5. Folmina's Brief, p. 17. Although a carrier cannot avail himself of the Harter Act without first showing diligence to make seaworthy, there is no such condition precedent to invoking the protection of valid exceptions in the bill of lading. He must merely show a loss within the excepted peril, and not *due to* unseaworthiness.

Hibernia Ins. Co. v. St. Louis Transp. Co., 120 U. S., 166.

The Caledonia, 157 U. S., 124, 132, 136.

6. Folmina's Brief, page 17, bottom. The only question before this court is whether the loss is within the "sea peril" exception. This question was never decided by the Circuit Court of Appeals in favor of the shipowner, Judge Lacombe and Judge Coxe adhering to the rule in *The Patria,* 132 Fed., 971. The decision of Judge Thomas was founded on a mistake—that of supposing that there was an "*express*" "sea *water*" exception in the bill of lading. 153 Fed., 365.

7. Folmina's Brief, page 18. The determination of the *onus probandi* (and consequently of the proper inferences to be drawn from failure of proof) is a question of law. Even had a state of actual seaworthiness been certified in the present case, this court would have been at liberty to disregard it if the certificate showed that actual seaworthi-

ness was merely the *inference* of the lower court upon insufficient evidence.

The Edwin I. Morrison, 153 U. S., 199, 207, 215, 216.
The Southwark, 191 U. S., 1, 13.

8. Folmina's Brief, pages 20-25. The phrase, "dangers and accidents of the seas and of navigation," means no more than "perils of the seas."

Carver, Carriage by Sea, sec. 84.
The G. R. Booth, 171 U. S., 450, 452, 458.

A sea peril is something "peculiar" to the seas; it does not include injury to a vessel by worms.

Garrison v. Memphis Ins. Co., 19 How., 312, 314, 315.
Cf. *Merchants' Trading Co. v. Universal Marine Ins. Co.*, 2 Asp. M. C., 431.
Dudgeon v. Pembroke, L. R., 9; Q. B., 581, 596.
The Chasca, L. R., 4; Ad. & Ecc., 446.

9. Folmina's Brief, p. 25. A sudden unexplained disaster to a ship soon after sailing is not ordinarily attributed to a sea peril.

The Southwark, 191 U. S., 1.

10. Folmina's Brief, p. 47. The use made of *Davidson v. Bernand*, L. R., 4 C. P., 117, seems misleading. Under the decision, liability was not based upon the "sea peril" phrase of the insurance policy sued on, but on the words "and all *other* perils, dangers, and misfortunes," etc. This is made particularly clear in the judgment of Willes and Keating, JJ.

11. Folmina's Brief, p. 49. The "rust" exception, like those of "decay" and "breakage," protects the carrier against natural deterioration and possible bad packing of cargo. On these matters the shipper would be in a better position to offer explanatory evidence than the carrier. The carrier

would have no similar need for a "sea-water damage" exception. There is no ground for construing a "sea-peril" exception as a "sea-water damage" exception. The same judge who decided *The Vaderland*, 18 Fed., 733 (here relied on by the carrier), decided also *The Lennox*, 90 Fed., 308, 309.

If carriers should hereafter adopt a "sea-water damage" exception, it should be held void as being unreasonable.

Inman v. South Carolina Ry. Co., 129 U. S., 128.

12. Folmina's Brief, page 50, admits carrier's duty to show the ship's reasonable fitness for the voyage, and the use of due care to avoid damage. Testimony by the master of "*general good condition*" (the certificate) is inadequate to show the former.

The Edwin I. Morrison, 153 U. S., 199, 212, 215.

Even were there a presumption of seaworthiness arising from the evidence in other respects (which there is not), the unexplained entrance of sea water into the Folmina's hold would rebut it.

Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S., 408, 428.

Neither seaworthiness nor due care can be duly shown without explaining how sea water entered the Folmina.

13. Folmina's Brief, page 51—reference to *The G. R. Booth:* Unseaworthiness *resulting* from the disaster in question is never material. The only question is whether unseaworthiness preceded and caused the disaster.

14. Folmina's Brief, page 52. Among the grounds (said to be unsubstantial) for requiring a clear and satisfactory explanation of the cause of damage are the decisions of this court in:

Howland v. Greenway, 22 How., 491, 502.
The Edwin I. Morrison, 153 U. S., 199, 210, 211.
The Majestic, 166 U. S., 375, 386.
The Southwark, 191 U. S., 1, 15, 16.
Cf. *The Reeside*, 2 Sumn., 567, 575 (Story, J.).

15. The Folmina's Brief refers to a considerable number of actions on policies of *marine insurance,* in which the entrance of sea water was treated as a sea peril. They do not decide that sea water is *of itself* a sea peril; but in these cases the entrance of sea water was regarded as tantamount to a sea peril, because a sea peril was properly inferred. The inference was proper, because the assured owes to the underwriter no duty of care. The *meaning* of "sea peril" is the same in an insurance policy and in a bill of lading, but the character of evidence necessary to raise the inference that there has been a sea peril is different.

Respectfully submitted,

FREDERICK M. BROWN,
Advocate for Libellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

The Steamship "FOLMINA,"
WILLIAM VAN EYKEN,
Claimant-Petitioner,

AGAINST

GUSTAVE A. JAHN and WILLIAM J. GRIFFITHS composing the firm of GUSTAVE A. JAHN & Co.,
Libelants-Respondents.

Notice of Application for Writ of Certiorari.

SIRS:

Please take notice that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit will be presented to the Supreme Court of the United States on Monday, March 2, 1908, at the opening of court at twelve o'clock noon, or so soon thereafter as counsel can be heard.

New York, February 10, 1907.

Yours, etc.,
CONVERS & KIRLIN,
Proctors for Petitioner.

To Messrs. WALLACE, BUTLER & BROWN,
Proctors for Respondents.

SUPREME COURT OF THE UNITED STATES.

The Steamship "FOLMINA,"
WILLIAM VAN EYKEN,
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AGAINST

GUSTAVE A. JAHN and WILLIAM J. GRIFFITHS composing the firm of GUSTAVE A. JAHN & Co.,
Libelants-Respondents.

Petition for Writ of Certiorari.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of William Van Eyken, claimant of the steamship *Folmina*, respectfully shows unto this Court as follows:

1. This is a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to require that the whole record in this cause be sent up to this Court for its consideration. A certificate has been sent to this Court by the said Circuit Court of Appeals asking the instruction of this Court on certain questions of law arising in the cause. The certificate is No. 313 on the Docket of this Court for the present term.

The petitioner is advised and believes that his rights and interest will be prejudiced by a decision on the certificate alone, for the reasons that the certificate is incomplete in its statement of facts; that the facts stated in it are the findings of a

divided court, and are at variance with the real facts as found by one of the Judges of the Court of Appeals, and as the District Judge apparently thought they existed; that the certificate is apparently framed with the view of asking the judgment of this Court on a previous decision of the Court of Appeals in another case, fol. 2451, bearing on a single aspect of this case, instead of requesting the opinion of the Court on all the important questions involved; and that an important question of law arising on a defence interposed under the Harter Act, on which the petitioner relied, is not included in the certificate, or in the questions to be answered.

2. The libel was brought in the District Court for the Eastern District of New York to recover for alleged damage to part of a shipment of 11,200 bags of rice carried in No. 3 hold on board the steamship *Folmina* from Kobe, Japan, to New York City in the early part of 1901.

The District Court dismissed the libel. *Record,* p. 580, 143 Fed. Rep., 636. The Circuit Court of Appeals first affirmed this decision, *Record,* p. 593, 153 Fed. Rep., 364, but later withdrew its mandate to the lower Court and made the certificate to this Court to which reference has just been made. *Record,* p. 615.

3. The proceedings in the Court of Appeals were these:

The appeal was taken by the libelants from a decree of the District Court for the Eastern District of New York, dismissing the libel with costs,

fols. 2344, 2350, entered in pursuance of an opinion by Judge Thomas. *Record*, pp. 580-585, 143 Fed. Rep., 636.

The Circuit Court of Appeals after due deliberation by a vote of two judges to one affirmed the decree, in an opinion filed March 26, 1907. Fols. 2383, 2384, 153 Fed. Rep., 364.

A decree of affirmance was entered in the Circuit Court of Appeals on April 5, 1907, providing that a mandate issue to the District Court in accordance with it. Fols. 2385-2388.

A mandate in usual form reciting the decree of the Court of Appeals and commanding the District Court to dismiss the libel was sent by the Clerk of the Court of Appeals to the proctors for the *Folmina* on April 8, 1907.

Thereafter and before the mandate was filed in the District Court, the proctors for the libelants-appellants filed on April 9, 1907, a petition for a rehearing in the Circuit Court of Appeals, praying in the alternative that, if a rehearing were denied, certain questions of law be certified by the Court of Appeals to this Court. Fols. 2393-2447.

On receipt of this petition the Court of Appeals through its Clerk communicated with the proctors for the *Folmina*, and ordered them to return the mandate which had been given to them. This order was complied with.

The Court of Appeals on April 16, 1907, in a short memorandum, granted the petition to the extent of allowing a reargument on the form of certificate to be sent to this Court for the pur-

pose of inquiring, in effect, whether the rule of decision announced in the case of *The Patria*, 132 Fed., 971, is correct. Fols. 2450-2451.

On April 26, 1907, an order was entered by the Court in the Circuit Court of Appeals formally recalling the mandate and vacating the order of affirmance previously entered.

On April 29, 1907, the date named by the Court, a reargument was had on the form of certificate to be sent to this Court. Counsel for the respective parties had been unable to agree on a certificate and, therefore, proposed certificates were submitted in behalf of both parties to the Court.

On May 7, 1907, a certificate in the form printed in the certified record submitted with this application, fols. 2457-2467, was forwarded to this Court. Fol. 2468.

This certificate differed from both the certificates submitted, but in its more important aspects is substantially like that submitted at the reargument by the proctors for the libelants-appellants.

This petitioner submits that the certificate as it now stands denies to him certain findings to which, by the evidence adduced and according to the opinions of both of the Courts below, he is rightly entitled, and fails to state one of the important questions of law involved.

4. There are three reasons for this application.

a. The first reason is that the Circuit Court of Appeals fails to find clearly as a fact in its

certificate that the *Folmina* was in all respects seaworthy at all stages of the adventure involved herein. The failure to insert such a finding amounts, it is submitted, to a denial of a right to which the steamship is entitled. No reargument was had on the question of seaworthiness. The two judges of the Court of Appeals who voted prior to the granting of the certificate to affirm the District Court's dismissal of the libel must necessarily have based their decisions on such a finding, because the *Folmina* has been shown by the evidence, as the District Judge said, "to have been absolutely seaworthy at every stage of the adventure," fol. 2337, and because without such a finding, express or implied, the bill of lading exceptions would not have been operative.

b. The second reason is that the Court of Appeals has failed to propound to this Court the question whether on the facts the exceptions contained in the third section of the Harter Act would not operate to exonerate the *Folmina*. The Harter Act has been invoked by the steamship throughout the litigation, and counsel for the petitioner in the form of certificate proposed by them suggested that one of the questions certified to this Court should be whether the steamship was not relieved from liability by the provisions of that Act.

c. The third reason for this application is that there is a very close and seriously contested question of fact as to whether the damage complained of was due to sea water or to sweat. As

to this the District Judge and the three Circuit Judges who have had this case under consideration are by no means in accord. The District Judge inclined to the theory that the damage was sweat damage, fols. 2333-2335, but considered a decision of the question unnecessary, fol. 2335, as in his opinion the bill of lading exceptions were a defence to the vessel under a finding either of sweat or sea water. Fol. 2336. One of the Circuit Judges has found that the damage was due to sweat. Fol. 2382. There is, therefore, no concurrent finding of fact in the lower courts by which this Court might feel itself bound.

These points will now be discussed in the above order.

5. The certificate should have contained a more clear and definite finding of seaworthiness.

After recapitulating various dry docking, surveys and repairs undergone by the *Folmina*, including a dry docking just previous to sailing for Japan on the voyage to the East, the homeward part of which is here in question, fol. 2463, and after stating that competent and experienced surveyors who examined the *Folmina* for both parties during and after the delivery of the rice cargo in question were unable to find any leaks in the hull, side-plating or rivets, fol. 2464, the statement of facts in the certificate concludes:

"No adequate means of access of sea water were found, nor any defect in the steamer which *then* appeared to be seaworthy." Fol. 2465.

This is the nearest approach in the findings of

fact to a finding of seaworthiness, and, if it be so considered, it is a finding of seaworthiness "during and after the delivery of the cargo," fol. 2463, not at the time the voyage commenced.

The questions of law asked of this Court at the end of the certificate are expressly based on the facts previously set forth. Fol. 2466.

In the first question the *Folmina* is referred to as "an apparently seaworthy ship." Fol. 2466.

The petitioner submits that in the findings of fact it is entitled on the record herein to a finding that the *Folmina* was seaworthy at all stages of the adventure in question.

She was not merely "apparently" seaworthy. She was shown to have been "seaworthy" by what the District Judge termed "the highest and most comprehensive proof." Fol. 2331.

The two judges of the Circuit Court of Appeals who voted to affirm the decree of the District Court dismissing the libel based their opinions on the fact that the bill of lading contained exceptions which exonerated the steamship. Fols. 2381, 2382. Their decisions must necessarily have been predicated on a finding of initial seaworthiness, for without it, under the decisions of this Court, bill of lading exceptions not within the limitations contained in Section 3 of the Harter Act, would have been nugatory. *The Edwin T. Morrison,* 153 U. S., 199, 210; *The Caledonia,* 157 U. S., 124, 137; *The Carib Prince,* 170 U. S., 661, 662. They voted to affirm a decision in a case in which the opinion

had been exceptionally emphatic in its finding of seaworthiness. Fols. 2332, 2337, 2338.

The District Judge in his opinion said, fols. 2328-2332:

"The rule that when the fact is in doubt, or the Court is in doubt as to the fact, the burden is on the carrier to solve the doubt, *has been fully met.* The carrier points to a sound ship, to which sea water could not gain access, and shows the existence of such condition during the voyage, and due preparation of the ship for the protection of the cargo, and ample care during the voyage. *Satisfactory and uncontradicted evidence that no defect discoverable in the exercise of requisite care existed between the receipt and discharge of the cargo is maximum proof. Evidence can produce no higher probative effect. Pass in review the variety of ways that sea water could enter, and the carrier's evidence meets them one by one and negatives not only the presence of every such opportunity, but also any negligence that would permit it. Both the fact and fault permitting its existence are absent.* Immediately one suggests any practical way for sea water to enter, for instance around the scupper-pipe, the ship is shown to have been sound in such respect. Was the way through a yielding plate? Not a strained or started rivet nor a strained plate justifies *even suspicion.* Was the entry through the ventilators or hatches? They are shown to have been closed during all weather that would permit it, and the sound condition of the hold spaces and other cargo disputes the possibility. Yet the libelants persist that the ship should, to free itself, make further disclosure. Why? *Conjecture even as to the cause has been exhausted, and the carrier to such limit has shown his innocence. Neither*

imagination nor experience suggests any way for the sea water to enter that is not negatived, or at least the evidence shows that the carrier did not contribute to it. Hence, the highest and most comprehensive proof has been reached."

Later in his opinion, fols. 2337, 2338, he said:

"In the present case the ship, from physical examination, appears to have been *absolutely seaworthy at every stage of the adventure.* To this it is answered that she was not seaworthy when and where the assumed sea water entered, and to this it is replied that the owner and his servants used diligence respecting every part or equipment whereby water, by any conjecture, could enter. Considering the recent construction of the vessel, her use and care after construction, the dry docking in New York preliminary to her Eastern voyage, the inspection and care of the hold before the rice was loaded, *the fact that she appeared in perfect condition upon her arrival, even to the degree that not a single suspicious condition appeared,* all this points to but one conclusion, that the owners or their agents used due care in sending her out from Japan, and the crew discovered no defect on the way, and *that no defect was discoverable. It does not seem just to condemn a ship with such a history."*

These findings of the District Judge which were thus affirmed by a majority of the Judges of the Court of Appeals in the opinion handed down before the granting of the certificate are fully sustained by the evidence.

The evidence of competent witnesses who were not impeached or contradicted showed:

a. That the *Folmina* was a steel steamship of the highest class in Lloyds' Register, fols. 1121, 1483, 1484, and at the beginning of the voyage was about two years old. Fol. 1483. She had been twice thoroughly examined in dry dock, once at Cardiff, fols. 1602, 1607, 1608, and again at New York, just before starting on the voyage to the far East where she loaded the rice in question. Fols. 1130, 1485. At New York she was surveyed in dry dock by Lloyds' surveyor and was then found to be tight, staunch and strong and in every way seaworthy and fitted for service as a cargo vessel. Fols. 1130, 1485, 1491.

b. That after dry docking the last time, she proceeded on a voyage from New York to Japan and on completion of the unloading at the close of that voyage, took on a full cargo for the return voyage, on which the damage here in question arose. Fols. 1485, 1490, 1491, 1492.

c. That the owner of the *Folmina* exercised due diligence to make the vessel herself in all respects seaworthy and properly manned, equipped and supplied and she was so at the beginning of the voyage from Japan towards New York. Fols. 1491, 2338.

d. That in the course of the return voyage the vessel experienced stormy weather, high seas, and wind of the force of from 9 to 11 on the Beaufort scale (including force 9, strong gale, force 10, whole gale, and force 11, stormy), during which the vessel rolled, pitched and strained heavily,

shipped heavy seas on deck and on one day suffered damage by the breaking of her rudder chain. Fols. 1502, 1507, 1517, 1518, 1521.

e. That careful soundings of the holds were taken regularly twice daily, but no water was found in any of the holds, fols. 1131, 1132, 1133, 1137, 1149, 1150, 1184, 1275, 1276, 1277, 1365, 1368, 1547, 1817, and no evidence of leaks was discovered in any part of the structure of the vessel or in any of the holds. Fols. 1132, 1272, 1273, 1276, 1277, 1363, 1364, 1365, 1548, 1816, 1817.

f. That it was not necessary at any time to pump out the No. 3 bilges and only about 5 buckets of water were found in them when they were cleaned at New York. Fols. 1150, 1273, 1279, 1364, 1817.

g. That no water entered the ship during the voyage through the hatches, decks or ventilators. Fols. 1122, 1128, 1129, 1131, 1132, 1159, 1178, 1194, 1259, 1363, 1364, 1480, 1843, 2244.

h. That there was no leak or break in any of the pipes of the vessel or around them by which water could have entered No. 3 hold. Fols. 82-86, 91-93, 452, 459, 1179, 1184, 1189, 1537, 1560-1562, 1843-1845, 1847, 1855, 1864, 1918-1920.

i. That there was no damage from wetting to the between deck cargo and no sign of dampness in the between decks. Fols. 481, 482, 1120-1122, 1128, 1145-1178, 1192, 1202, 1204, 1259, 1357, 1479, 1480, 1842-1844, 1918-1920, 2095, 2096, 2100, 2101, 2103, 2104, 2171, 2174, 2217, 2243.

j. That there was no damage in the upper tiers of cargo in the No. 3 lower hold, fols. 1114, 1205, 1206, 1948, 1949, 1987, 2105-2109, 2140-2142, 2195, 2219, and that there was no damage in the bottom tiers of the rice in No. 3 hold. Fols. 1214, 1218, 1219, 1360, 1361, 2177, 2215.

k. That during and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with the No. 3 hold and the *shell plating* of the steamer in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants and their underwriters, and that it was afterwards examined by competent and experienced surveyors representing both parties, including the principal surveyor to Lloyd's Register in the United States. The decks, hull, side-plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence was found which indicated that there had been any leaks in any part of the frame, structure, side-plating, riveting, pipes or appurtenances of the ship, through which sea water might have entered the No. 3 hold and caused the damage during any stage of the voyage. No leaks in the riveting or side plating or decks, or any part of the structure or appurtenances surrounding or connected with No. 3 hold existed when the hold was inspected preparatory to the loading of the cargo or at the time while it was being discharged from the hold, or at any time thereafter before the conclusion of the surveys that were made by the various

surveyors who examined the ship in behalf of the respective parties, as above mentioned. Fols. 82-88, 91-93, 102-109, 120, 400-402, 414, 416-420, 445-447, 452, 459, 475-476, 481, 482, 488-489, 493-499, 1120-1122, 1128, 1138, 1145-1178, 1179, 1184-1189, 1192, 1202-1204, 1229, 1230, 1248-1249, 1259, 1275, 1278-1280, 1357, 1364, 1370-1372, 1375-1376, 1479-1481, 1531-1538, 1552-1559, 1560-1562, 1759-1765, 1773-1775, 1805, 1842-1851, 1855-1864, 1868-1870, 1871-1876, 1897-1899, 1907-1911, 1916-1920, 1921-1922, 1925-1939, 2095-2096, 2100-2105, 2171, 2174, 2217, 2243.

l. That no repairs were made to the riveting, plating or any part of the sides or structure of the ship surrounding the No. 3 hold between the time of the shipment of the cargo in question, and the surveys above mentioned. Fols. 1248, 1249, 1375-1376, 1458-1462, 1536-1538, 1570-1572, 1597-1610, 1636, 1775, 1868-1870, 1876-1878, 1907, 1908, 1925-1927.

The conclusiveness of this testimony is admitted by the appellants' counsel in his petition for reargument. Fols. 2440, 2441.

He says, in asking the Court to send up a certificate in this case:

"The question of law that is presented in this case is, whether, in case of a vessel, not shown to be unseaworthy and not shown by affirmative evidence to be in any way in fault, sea water enters, such event shall be regarded as falling within the terms of the sea-peril clause of the bill of lading. The question is, whose risk is it,

that cargo should be damaged by sea water in some way *that no human being can explain?"*

The petitioner is advised and believes that in view of these facts and findings, the certificate as it stands at present is insufficient and deprives the petitioner of a right to which he was entitled, namely, an unequivocal finding of the seaworthiness of the *Folmina* at the commencement of the voyage with the cargo in question.

The Circuit Court of Appeals has asked this Court to define the scope of a certain exception in a bill of lading, but has not made findings of fact so definite as to make it certain that the exception would be operative.

As the certificate now stands, therefore, this Court may be brought into the dilemma of either having to dismiss the certificate because the Circuit Court of Appeals has failed to make a definite finding on an essential matter or of having to *infer* from the meager and incomplete facts stated whether or not the *Folmina* was seaworthy at the inception of the voyage.

The only escape from one of these two courses seems to be an examination of the record on which the certificate is based.

On the question of the operation of exceptions in a bill of lading, seaworthiness is a condition precedent. *The Caledonia,* 157 U. S., 124, 130, 137 and other cases cited above. And as this Court said in *International Navigation Company* v. *Farr and Bailey Manufacturing Company,* 181 U. S., 218, at page 224, approving and

quoting an observation of Lord Blackburn in *Steele v. State Line S. S. Co.*, L. R. 3 App. Cas., 72:

"The question whether a ship is reasonably fit to carry her cargo must be '*determined upon the whole circumstances and the whole evidence.*'"

That the seaworthiness of the *Folmina* should be so determined by this Court is the prayer that the petitioner here makes.

7. The petitioner was entitled to have certified to this Court the question whether, on the facts of this case, the *Folmina* was absolved from responsibility for the damage to the rice by the provisions of the third section of the Act of Congress, approved February 13, 1893, entitled "An Act relating to the Navigation of Vessels, &c." and commonly known as the Harter Act.

In case the ship owner has exercised due diligence to make the vessel in all respects seaworthy and properly manned and equipped the third section of the Harter Act relieves the carrier from liability for "losses arising from dangers of the sea."* Damage by sea water or by sweat is a

*Act of Congress, February 13, 1893. Section 3. "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, or owners, agent, or charterers shall become or be

danger of the seas in such circumstances. *Clark* v. *Barnwell*, 12 How., 272, 282; *The G. R. Booth*, 171 U. S., 450, 459, 460; *Hooper* v. *Rathbone*, Taney, 519, also reported, 12 Fed. Cas., 1275; *The Viscount*, 11 Fed., 168; *Blackburn* v. *Liverpool, etc., Navigation Co.* (1902), 1 K. B., 290; *The Xantho*, 12 App. Cas., 503; *Hamilton* v. *Pandorf*, 12 App. Cas., 518.

The exemption from dangers of the seas is, therefore, a *statutory* exemption, the operation of which depends *on the exercise of due diligence* by the ship owner in making the vessel seaworthy for her voyage, and not, as in the case of an exception not included in the statute, on an absolute warranty of seaworthiness. *The Carib Prince*, 170 U. S., 655, 661, 662.

Accordingly, it is submitted, that the Court of Appeals, if it was unwilling to make an explicit finding of initial seaworthiness, should have found as a fact that due diligence was used to make the

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held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Folmina seaworthy and then should have asked this Court whether, under the circumstances, the exceptions in the third section of the Harter Act exonerated the vessel from liability; or else it should have asked whether on the facts as found in its certificate due diligence could be predicated, and if so, whether the statutory exceptions afforded immunity.

As the certificate now stands, the applicability of the Harter Act is not in any way raised, and by reason of this omission the petitioner's rights may be, and in his opinion are, seriously prejudiced.

That the Harter Act affords an exemption to the steamship in this case has been the contention of the petitioner from the commencement of this litigation. It is no new issue now advanced for the first time.

It was raised in the answer to the libel. Fols. 27, 28. It was argued in both courts below.

It has not been of such importance hitherto as it is in the present aspect of the case, because of the fact that the proofs showed, according to the contention of the steamship, that she was initially seaworthy, and because the courts below found that as a fact. *Ante* pp. 9-14.

Now, however, when a satisfactory finding of seaworthiness has been denied to the petitioner in this certificate, the importance of the Harter Act is much emphasized. It was for this reason and to guard against the very conditions now obtaining that when the Court of Appeals asked that a form of certificate be submitted by each party on

the reargument of April 29, fol. 2450, the counsel for the petitioner requested that one of the questions to be certified should be:

"Is the *Folmina* absolved from the damage thus caused to the rice by the provisions of the third section of the Act of Congress approved February 13, 1893, entitled 'An Act relating to the Navigation of vessels, &c.' and commonly known as the Harter Act?"

On the facts proved in the record submitted herewith the use of due diligence within the meaning of the Harter Act is clearly shown. The references to the relevant portions of the evidence are given *in extenso* in connection with the contention that the certificate should have contained a finding of initial seaworthiness. *Ante* pp. 11-14.

The District Court, fols. 2328, 2329, 2332, 2335, 2337, 2338, and the majority of the Circuit Court of Appeals, fol. 2382, must be deemed to have found that due diligence had been used to make the *Folmina* seaworthy. Their finding that the implied warranty of *actual* seaworthiness had been complied with must necessarily be deemed to have included a compliance with the less rigorous statutory requirement. Certainly, the exercise of due diligence can be fairly asserted where, as here, the counsel for the libelants states under oath that the assumed sea water entered "in some way no human being can explain." *Petition for Reargument,* fols. 2441, 2446.

For the reason that the question of the applicability of the Harter Act was not certified, if for no other reason, the present application should be

granted. Otherwise, the petitioner will in effect be denied the statutory exemption given by Congress to ship owners who have exercised due diligence properly to fit and man their vessels.

8. In addition to the two questions of law just discussed there is a serious and closely contested question of fact as to whether the damage complained of was due to sweat or to sea water.

Of this question two of the four judges who have heard this case below may fairly be said to have taken one view, and two the other.

The District Judge did not explicitly find to which cause to attribute the damage; he regarded it as unnecessary to do so in view of his opinion as to the legal effect of the bill of lading exceptions. Fols. 2335, 2336. But his inclination is clearly shown in his opinion, where he says, fol. 2333:

"There may be some mystery about the damages. There would be none if the fact were that sweat and heat caused the injury, and there would be no difficulty in finding that as a fact, if the report of the libelants' analysts had not shown an undue proportion of salt in the bags and injured rice. The claimant's contention, that the rice absorbed the remnant of mineral salt on an earlier voyage carried in the same hold, may have some value. If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities, as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship, strong-

ly aid the evidence that it did not enter. But that is left undecided."

The mineral salt referred to by the District Judge as having been carried by the *Folmina* on a previous voyage was kainit, found principally near Stassfurt, Germany. *Century Dictionary*, Vol. IV, page 326; *Encyclopedia Britannica*, Vol. 21, pp. 228, 229. Kainit is imported to this country for use as a fertilizer, and in its commercial state contains an admixture of from 30% to 45% pure salt or sodium chloride. *Thorpe's Dictionary of Applied Chemistry*, Vol. III, 2nd Ed., p. 269; *Pamphlet of German Kali Works*, (Owner of Stassfurt Mines), 1893, p. 14. According to Thorpe sea water contains all the elements found in the Stassfurt deposits. Thorpe, *Dictionary of Applied Chemistry*, 2nd Ed., Vol. III, pp. 266, 267. He shows by his figures that the average sea water contains about 2.7% of sodium chloride or common salt. This is less than one-tenth of the percentage of common salt found in kainit.

The petitioner's theory is that the damage was due to sweat and that the salt claimed to have been found in the tests was due to the fact that minute particles of kainit which had been carried *in bulk* in No. 3 hold from Hamburg to Charleston, just prior to the *Folmina's* voyage to the East, fol. 1589, had clung to the beams and plating of the vessel and were absorbed therefrom into the rice with the sweat. The probability of this is clearly indicated by the fact that the kainit had worked in behind the cargo battens of the No. 3

hold, and become caked on the plating of the ship. Fols. 1637, 1638. In fact it had to be dug out of the hold with pickaxes. Fols. 1591-1595. The hold had, of course, been cleaned on the voyage from Charleston to New York. But it was obviously impossible to remove the kainit entirely from the side-plating, for the plating was at least nine inches outside of the battens which were permanent fixtures fastened horizontally on the ship's frames at intervals of six to ten inches. Fol. 1165.

The libelants' chemist testified that the presence of *salt would not increase the tendency to sweat,* fols. 706, 707, and their principal cargo surveyors conceded that the *damage would be the same whether due to sweat or salty dampness.* Fols. 172, 508. The kainit was an incident of the damage, in no sense a *cause* of, or *addition* to it. The presence of the kainit did not, therefore, render the hold unfit for the rice.

The contention put forward by the petitioner that the salty traces claimed to have been found in the damage must have been due to kainit, does not mean, as the libelant will probably contend, that the No. 3 hold of the *Folmina* was caked and dirty with kainit or in any respect unseaworthy for the carriage of rice. Kainit, as has been seen, contains a proportion of salt, so much greater than sea water, that a few particles of kainit clinging in places to the side or frames of the ship could very well explain the slightly saline quality of the damage.

This view of the case was evidently taken by the District Judge and by the Circuit Judge who voted for affirmance on the ground that the damage was due to sweat. Fol. 2382. No other explanation of the damage or of its saline quality than that it was due to sweat tinctured with the kainit particles, squares with the evidence. For in view of the impossibility of explaining the presence of sea water, the explanation of the presence of salt already within the vessel clears up the mystery of the damage and points unmistakably, it is submitted, to its true cause.

On this question of fact, therefore, in view of the divergence of opinion below, the petitioner desires to be heard by this Court.

9. Since the opinion of the Circuit Court of Appeals was handed down and the questions certified, Judge Townsend has died. It cannot be inferred from the record what views the two surviving judges of the Circuit Court of Appeals who heard this case may have taken on the questions involved in it. It may well be that they took opposite views of the facts, that one of them held the damage to be sweat, and that, in any event, a reargument in the Court of Appeals will be necessary if this Court passes on the certified questions only. It would, therefore, seem desirable that this Court should pass finally on all the questions involved in the cause.

10. The case is one of unusual importance on the question of liability for cargo damage.

The difficulties involved are indicated suffi-

ciently by the opinions below, and by the fact that questions of law have been certified to this Court by the Court of Appeals.

The damages claimed are not inconsiderable, amounting at the present time with interest to about $30,000.

The certificate sent up does not clearly and fully present the issues to this Court as the evidence entitles the petitioner to have them presented.

The petitioner, it is submitted, ought not to be concluded in this Court by the possibly unfavorable inferences drawn from the facts by two only out of the four judges who have heard the case.

In order, therefore, to conserve the rights of the petitioner, the certificate now before the Court, it is submitted, should be supplemented by the full record of the proceedings below, and this Court should decide the whole matter and controversy as if it had been brought here for review by writ of error or appeal.

11. The petitioner presents herewith a certified copy of the transcript of record returned from the District Court for the Eastern District of New York to the Circuit Court of Appeals for the Second Circuit and of the record in the last mentioned Court.

Wherefore the petitioner prays that this Honorable Court will cause the writ of certiorari to be issued pursuant to the power vested in this Court by the Judiciary Act, approved March 3, 1891, requiring said United States Circuit Court of

Appeals for the Second Circuit to certify the whole record and cause to this Court for consideration, and that thereon this Court will decide the matter in controversy between the parties. And your petitioner will ever pray, etc.

WILLIAM VAN EYKEN,
By Convers & Kirlin,
Proctors.

STATE OF NEW YORK,
County of New York. } ss.:

J. PARKER KIRLIN, being duly sworn, says:

I am the surviving member of the firm of Convers & Kirlin, proctors for the petitioner herein, and I have had personal charge of this litigation throughout. I have read the foregoing petition and it is true to the best of my knowledge, information and belief.

The reason why this petition is not verified by the petitioner is that he is not now within this District.

This application is made in good faith and not for the purpose of delay.

J. PARKER KIRLIN.

Sworn to before me this 26
day of February, 1907.

CHAS. R. HICKOX,
[SEAL] Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court.

J. PARKER KIRLIN.